

## IMMIGRATION UNIVERSITY CLINICS AND REGULATION:

### A WORKING CASE STUDY

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#### Abstract:

This paper seeks to introduce readers to the regulation of immigration advice, and how this can work in practice in clinical legal education. The case study of Queen Mary Legal Advice Centre demonstrates that although the statute does not ideally seem to fit with the regulation of university law clinics, it is possible to be compliant. Far from being a negative aspect, regulation in these unique legal advice settings can actually provide a rich ethical learning environment and produce well rounded future lawyers.

#### *The Office of Immigration Services Commissioner*

The Office of the Immigration Services Commissioner (OISC)<sup>1</sup> is the statutory regulator of immigration advice and services in the United Kingdom. The OISC was established by Part 5 of the 1999 Immigration and Asylum Act<sup>2</sup> in response to growing concerns that vulnerable migrants, in particular asylum seekers, were falling prey to

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<sup>1</sup> <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner> (as of 17/08/18).

<sup>2</sup> <https://www.legislation.gov.uk/ukpga/1999/33/section/83> (as of 17/08/18).

unqualified and unregulated immigration advice providers. Large numbers of refugees and other migrants, who were seeking advice and assistance in navigating the increasingly complex immigration rules and asylum procedures in the UK, were easy targets for unscrupulous advisers. With little understanding of how long various immigration decisions would take or the work involved, clients paid large sums of money for assistance with some discovering at a later point that no work had been undertaken on the required application. Migrants would unknowingly become overstayers with many facing re-entry bans. Even within the charitable sector, well-meaning but incompetent advice was provided which could be just as devastating to the client's long term prospects of leave to enter or remain in the country.

The OISC has been in operation for the last 17 years and currently regulates approximately 3000 advisers operating in 1500 registered organisations. Any person providing immigration advice and services in the UK who is not already regulated by a Designated Qualifying Regulator (DQM)<sup>3</sup> and thus a 'qualified person' under the Act, must be regulated by the OISC in order to provide immigration advice and services. That is those that relate to an application to the UK authorities for any type of leave to enter or remain (including asylum and immigration bail work), applications for British nationality and citizenship and admission to or residence in the UK under EU law. It is important to note that it is the entity that the OISC registers

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<sup>3</sup> Designated Qualifying Regulators include the General Council of the Bar, Law Society of England and Wales, Chartered Institute of Legal Executives, Faculty of Advocates, Law Society of Scotland, General Council of the Bar of Northern Ireland, Law Society of Northern Ireland.

and through the entity, the immigration advisers that provide the advice and services. To provide immigration advice and services while not regulated is a criminal offence<sup>4</sup> and the OISC investigates and prosecutes those who operate when not authorised to do so.

### *The Statute*

Whether individuals working within certain bodies are in fact regulated by a DQM can be complex. Solicitors working in law firms and barristers in chambers are likely to be fully regulated by their respective regulatory bodies, further; they are normally permitted to supervise non-legally qualified staff to also provide immigration advice and services acting on behalf of the regulated organisation. Outside of law firms and chambers the situation becomes less clear. Solicitors working in practices which are authorised to operate by a DQM set up under the Alternative Business Structure can also supervise non-legally qualified staff and these individuals do not need to be regulated by the OISC. However, practicing solicitors working in Law Centres and certain charitable organisations that have been permitted to employ solicitors to provide advice and services to the public are not (in England and Wales) permitted to supervise others. This means that while practicing solicitors in these settings may be regulated by the Solicitors Regulatory Authority, or barristers regulated by the Bar

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<sup>4</sup> <https://www.legislation.gov.uk/ukpga/1999/33/section/91> (as of 17/08/2018).

Standards Board, non-legally qualified staff providing immigration advice and services must be regulated by the OISC. This therefore applies to students working in clinical legal education (whether under the supervision of employed and qualified clinicians or volunteer barristers or solicitors).

*Where do University Law Clinics Fit in the Statute?*

What does this mean for Law Clinics operating in the UK who provide immigration advice and services to the public? Those operating in England and Wales will need to consider carefully how they deliver their advice and services.

Where they are provided completely through a practicing solicitor, with all advice and any representations made to the UK immigration authorities' being made in their name, then it is likely they will not need to be regulated by the OISC even if students assist in the research or gathering of information that supports a particular application. However, if advice and services are provided in the name of the Law Clinic then the Law Clinic (or any other similar type of organisation) as an entity, and any non - solicitor staff will need to apply to the OISC for regulation. Law clinics operating in Northern Ireland and Scotland should confirm with their respective regulators if they regulate students who provide immigration advice and services in the name of the Law Clinic.

*A Working Pilot: The Queen Mary Legal Advice Centre*

The Queen Mary Legal Advice Centre (QMLAC)<sup>5</sup> is a free community legal advice centre based in the heart of East London - an area particularly marred with a reputation for untrustworthy immigration legal advice. QMLAC engages undergraduate students in the provision of legal services across a range of clinics including those which cover immigration advice; a general immigration clinic, Pink Law (where the immigration issues relate to membership of the LGBT+ community) and The EU AIRE Hub (legal queries relating to the free movement of people within the European Union). The clinics are advice only, rather than representation. Clients attend for appointments and provide the detailed facts of the case to the student who is supervised by a barrister or solicitor (both at the appointment and when compiling the advice). The supervised legal advice is then sent to the client, in writing, within 14 days of their appointment. The advice will typically undergo legal checks from the volunteer barrister or solicitor, and professional checks (such as proof reading) from Centre staff. In the academic year 2017-18 there were thirty five clients across these three clinics who received immigration legal advice. Fifteen students advised in these areas.

There is no doubt that the regulatory position of university law clinics has been a confused picture for some time. It was summer 2017 when the QMLAC approached OISC to try and resolve the issue of compliance. Far from the reprimanding that the

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<sup>5</sup> <http://www.lac.qmul.ac.uk/> (as of 17/08/18).

QMLAC expected, the OISC praised the clinic and took a flexible approach to regulation to allow the Centre to continue operating in this area. This type of hybrid organisation (not a law centre or a firm) was new to OISC, and quite early on in the discussions it became apparent that a flexible approach was most suitable.

*Step 1: Register the Clinic:*

The QMLAC completed the relevant form<sup>6</sup> to get the organisation registered as an OISC approved body to provide immigration legal advice. The form is primarily designed for independent advice offices meaning some of the information requested was more difficult for the Law Clinic to provide (for example accounts). However discussions with the OISC around such issues meant that the forms were simple to complete and QMLAC became registered a few months later.

Further, as part of the registration it was necessary to list the barristers and solicitors who volunteer at the QMLAC. Although a comprehensive list was given, the OISC were pragmatic in realising that sometimes other people from the same Law Firm may step in at short notice to cover for a busy colleague. The QMLAC demonstrated that there were good procedures in place for when this happened to both record the new volunteer details and train them in the QMLAC procedures.

Registration had the added benefit that the QMLAC was able to advertise that they were OISC registered (and display the logo on their website).

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<sup>6</sup><https://www.gov.uk/government/publications/oisc-application-for-regulation-of-a-new-legal-entity> (as of 17/08/18).

*Step 2: Authorising the Advisers:*

The turnover of students involved in clinics (whether immigration or otherwise) is always high. Further, the academic year is very short, meaning that the moment students start in September / October they need to be in a position to hit the ground running in order to complete a sufficient number of cases and have a meaningful educational experience.

Applications for new advisers are two fold; firstly students need to complete an OISC ‘New adviser application and competence statement’<sup>7</sup>. This relatively straightforward form can be completed within 20 minutes or so with guidance from a member of staff.

Again, OISC took a pragmatic position when the forms asks for applicants to list all jobs and work experience and helped incorporate the QMLAC standard training and the student’s degree courses into the form. This helped to keep the process streamline.

QMLAC had a specific workshop for students to attend to complete this form with a member of staff who had previously liaised with OISC. The staff member was able to help students with stock phrases relating to training and their degree which could be inputted.

Secondly applicants need to have a suitable Data Barring Service (DBS) check. As part of Queen Mary University, all the QMLAC DBS checks needed to go through a central team. In this case it was the central Widening Participation Team. DBS forms are

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<sup>7</sup> <https://www.gov.uk/government/publications/new-adviser-application-and-competence-statement> (as of 17/08/2018).

lengthy and can be complex (especially for foreign students). Submitting these forms and sending them in with copies of appropriate documents was a very lengthy and drawn out task. The OISC registration was delayed pending the return of the DBS certificate. There were further complications in the certificates sometimes being sent by the DBS service to old addresses that students were in when they did finally come through.

This all produced the undesirable consequence that students were nearly finishing their 6 months at the QMLAC when their authorisation was complete. This authorisation of advisers was taking up a lot of staff time and causing logistical difficulties. To try and address this issue in the academic year 2018-19 there has been an earlier selection of students so forms can be completed and submitted before the summer break. It was also agreed that the OISC forms could be submitted before the DBS checks have been returned.

QMLAC students are registered as Level 1 advisers<sup>8</sup> with permission by the OISC to provide Immigration Advice and Services up to Level 2 under supervision. If QMLAC wanted to offer advocacy in immigration matters (Level 3 work), the students would need to gain authorisation at Level 2 which would require additional application procedures for QMLAC in additional assessment of the students competence.

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<sup>8</sup> <https://www.gov.uk/government/publications/competence-oisc-guidance-2012> (as of 17/08/2018).

Advisers seeking authorisation with the OISC normally undertake a written competence assessment. At Level 2 and 3 this involves a written exam paper taken under exam conditions at an OISC test centre. Any adviser authorised by the OISC may apply through the registered organisation to take assessments at higher levels. There is no cost to the individual or organisation to make such an application. Law Clinics might therefore consider whether they wish to make such applications for students where they feel the student has gained sufficient knowledge and experience and is interested in gaining a higher level of authorisation.

It is worth noting that QMLAC students are only authorised at QMLAC to give legal advice. The authorisation granted to any OISC adviser is not transferable to another organisation, thus a Queen Mary student would not be entitled to provide immigration advice and services at another clinic or to provide immigration advice or services outside of QMLAC. Again underpinning that it is the Centre which is registered then the adviser through the Centre.

*Step 3: Auditing:*

The QMLAC has been visited twice by the OISC. Firstly a visit was made prior to registration. The OISC considered the premises, handbooks, procedures and client file format to check that it was to a certain standard. After a year of registration, the OISC completed an audit of the Centre. As is standard, a list of immigration cases was submitted in advance of the visit. The visit itself took half a day. Cases were randomly selected, viewed in electronic format by the OISC and a follow up letter

outlining the visit was issued. The preparation for, and timing of doing the audit is not arduous (providing of course that everything is in order).

### *Reflection and the Future*

There is no doubt that the regulation of law clinics is complex<sup>9</sup> and has not been fully resolved. This niche area within that wider gap can feel like an added layer of intricacy asking already stretched clinicians deal with more bureaucracy. There is no doubt that the gaining authorisation for each Student Adviser within the QMLAC is more work for clinicians. Both the OISC and QMLAC have tried to approach this seemingly adverse situation with a fresh layer of flexibility and enthusiasm. As such some benefits have arisen.

- It provides a real and current clinical example of regulation to the students. This means from an early stage in their education students do not view regulation as a negative to be feared but as a protection mechanism for vulnerable clients and the profession.
- Regulation has been a rich learning ground for developing a deeper understanding of professional ethics. Students at the QMLAC undertake reflection sessions at 'Breakfast Club' where the SRA Principles<sup>10</sup> and the Bar Core Duties<sup>11</sup> are regularly discussed. Linking these to clinical work (especially

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<sup>9</sup> Linden Thomas (2017) Law clinics in England and Wales: a regulatory black hole, *The Law Teacher*, 51:4,469-485, DOI: [10.1080/03069400.2017.1322858](https://doi.org/10.1080/03069400.2017.1322858)

<sup>10</sup> Part 1 of the SRA Handbook. Published on 1<sup>st</sup> October 2017.

<sup>11</sup> BSB Handbook, version 3.2, updated February 2018, Part 2, B.

those relating to regulators) can sometimes be difficult. This relationship between the OISC and the QMLAC provides a simple backdrop to introduce the importance of regulation and link it to a student's duty to their client and their duty to provide a good standard of care.

- Students see beyond their clinical setting and are introduced to the wider legal world. Through discussions as to the reasons behind regulation they see that the idyllic world of being a barrister or solicitor is not always correct. This sense of realism adds a layer of maturity to student thinking which they take forward to employment interviews.

Of course there are further changes to be made, and in an ideal world the statute would be amended to allow more flexibility to students in a clinical setting. Essentially a recognition that students in clinics are *very* heavily supervised and that students more often than not feel a deeply committed sense of responsibility to their clients. Exactly how this flexibility would be inputted is yet to be seen, but removing the need for a DBS check and / or simplifying the adviser authorisation process would be an important step.

If this article has the intended outcome of attracting more clinical legal education initiatives to provide immigration legal advice, this will create more student advisers needing to be authorised. As more clinics start to register with the OISC it will in all likelihood be necessary for the OISC to consider further where efficiencies in the application process might be made, especially when the advisers are usually only

needing to be registered for a short period of time such as six months. This may of course lead to changes in the individual adviser authorisation process. However, for the moment the statute remains solid and an in-depth two stage registration process continues, with consideration of the fitness of the clinic itself (how it operates and is managed) and the fitness and competence of the student advisers.

### *Previous Poor Legal Advice*

It is perhaps unsurprising that free law centres and university clinics who offer immigration advice will be some of the front line services to hear of unscrupulous immigration legal advice which clients have previously paid for. The OISC is committed to protecting vulnerable people and stopping poor advice. Should your Law Clinic be aware of clients who have received poor quality immigration advice and services from any person in the UK, the OISC can take such complaints and investigate. If the complaint relates to a person regulated by another DQR the OISC will refer this matter on. Where it relates to an OISC registered adviser the OISC will look to investigate the matter themselves. Clients may be reluctant to make complaints, particularly if their own immigration status is precarious. As an independent body the OSIC will never share information with the Home Office related to a client. Their interest is in the adviser only. Law Clinics can support a client to make a complaint or can make one on their behalf. A complaint that includes details of the specific client is always best as it means the OISC can look into the individuals

matter fully, however complaints can also be made which do not name the client but raise an issues of concern around a particular adviser<sup>12</sup>.

The opportunities for teaching ethics which arise from working closely with a regulator are both obvious and subtle. The obvious professional ethics principles to discuss with students include; upholding the rule of law and the proper administration of justice<sup>13</sup>, Delivering a competent standard of work<sup>14</sup>, and acting with integrity<sup>15</sup> etc. but there is a pool of rich learning in situations where clients come to clinics having received bad previous legal advice. Is there a duty for the Clinic to inform the client that they could make a complaint to the OISC or elsewhere? Is there actually a duty on an OISC regulated clinic to make an anonymous complaint themselves? How does a clinic uphold confidentiality in these circumstances? Is making a complaint against the wishes of a client acting in their best interests?

We are all well aware of the rich and diverse range of ethical issues that clinical legal education already produced. Mixing in a regulator which students have to actively

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<sup>12</sup> <https://www.gov.uk/find-an-immigration-adviser/complain-about-an-adviser> (as of 17/08/2018)

<sup>13</sup> The Solicitors Regulation Authority Principle 1 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18), and The Bar Standards Board Core Duty 1 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/2019).

<sup>14</sup> The Solicitors Regulation Authority Principle 5 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18) and The Bar Standards Board Core Duty 7 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/18).

<sup>15</sup> The Solicitors Regulation Authority Principle 2 (<https://www.sra.org.uk/solicitors/handbook/handbookprinciples/part2/content.page> as of 17/08/18) as of 17/08/19), and The Bar Standards Board Core Duty 3 (<http://handbook.barstandardsboard.org.uk/handbook/part-2/> as of 17/08/18).

join (rather than the SRA / BSB which may feel like a lifetime away) can be another tool to pass over the student responsibility to ensure deeper learning.

### *Conclusion*

Clinics work hard to ensure that some of the most vulnerable in society are respected and not taken advantage of, while teaching students good practice. Both these principles underpin the work of the OISC who concurrently want to support the provision of good quality, (usually free) legal advice that clinics provide to this vulnerable group in society.

While there is undoubtedly some bureaucracy involved in the OISC registration process it is clear that the OISC do not wish to create barriers to innovative programmes such as those designed by Law Clinics. The OISC recognise that such programmes not only provide a much needed service to local communities but lay the ground work for competent and ethical immigration advisers of the future.

Should you be concerned that your Law Clinic may need to be regulated by the OISC please contact the Voluntary Sector Support Group at the OISC ([VSS@oisc.GOV.UK](mailto:VSS@oisc.GOV.UK)). You can e-mail the group with details of how the Law Clinic operates and we will confirm for you if you do need to be regulated. It is worth noting that how services are delivered affects whether the clinic will need to be registered with the Commissioner.

The Voluntary Sector Support Group at the OISC also has a dedicated section on their website which provides advice about regulation specifically for the voluntary and community sectors which may be helpful to consult. This can be found at <https://www.gov.uk/government/publications/guidance-for-the-community-and-voluntary-sector>