

NALP response to the Professor Mayson's Independent Review of Legal Services Regulation August 2020

Introduction

We at NALP have taken our time in contemplating the content of the Review by Professor Mayson, published in June 2020, as there are a lot of details and recommendations to consider and we did not feel this is something that could, or should, be rushed.

The Review makes some very interesting points in its opening remarks, such as:

- A survey of 'Lawyers' (which in this report appears to encompass anybody that falls within the scope of the current statutory regulation and Reserved Activities – e.g. solicitors, barristers, Legal Executives, etc.) indicated that only 20% of their work falls within the remit of the Reserved Activities.
- A YouGov survey of 30,000 people showed that 60% of people had a legal issue, but that only two-thirds of those actually received help and less than half of those receiving help did so from a regulated legal service.
- The current regulatory framework would appear to only be applicable to 10% of the individuals who require the help of legal services, leaving the other 90% to fend for themselves.

Because of the above, the overriding recommendation is a complete overhaul of the regulatory framework, bringing all areas of the legal services sector under one regulatory 'roof' and ensuring that all providers of legal services, including those currently not covered by statutory regulation, to be registered and regulated to a larger or lesser extent, depending on the services they offer. The recommendation goes on to state that the new single regulator would have a statutory duty to apply the minimum necessary regulation. It is also suggested that an assessment of the risk to public interest and the consumers should be carried out, with the level of burden and cost being proportionate for each legal services provider based on that risk assessment. This inclusive regulation would also offer investigation and redress for all consumers and small businesses who have complaints about their legal services provider.

Within the review, Professor Mayson makes it clear that the vast majority of individuals and small businesses seek help from unregulated legal sources. Some can be family and friends, but, as our members are well aware, the services provided by paralegals are becoming highly sought after, but it also leaves them vulnerable to unqualified, unregulated and unscrupulous people. The consequence of this is something that NALP, as a Professional Body, has been seeking to address for more than 30 years via our self-regulatory approach and encouraging, through many avenues, those paralegals, who have not yet taken the step, to be part of our self-regulatory professional membership body.

Professor Mayson's recommendations come with a short-term and a long-term option. At NALP we have considered these recommendations, and also looked at the report in detail. We have therefore provided an overall summary of our response to the Report as a whole which concentrates on the viewpoint of our members and the effect the proposed changes may have on their clients, many of whom will be among the most vulnerable in our society. We have then addressed each individual recommendation, taking a broader view where appropriate.

Summary of Overall Response:

NALP has never been averse to paralegals being subject to additional statutory regulation, provided that this is proportionate and takes all prevailing factors into account. At NALP we have always ensured that our Code of Conduct and Ethics, and all guidance, etc. provided to our members are in line with those of our statutory regulated colleagues and their membership bodies such as the Law Society. We have strived to ensure that our members meet the same high standards they would be held to under statutory regulation, despite our being a voluntary regulatory body.

NALP is the oldest established membership and voluntary regulatory body for Paralegals in the UK, having been in place since 1987. We are also the only voluntary regulatory body that is also a Recognised Awarding Organisation, offering qualifications that are fully regulated by Ofqual, specifically designed for paralegals. We have strived to forge good working relationships with the Ministry of Justice and the Legal Services Board, as well as having an excellent relationship with The Law Society with whom we meet regularly. We operate transparently and with the highest integrity and expect the same of our members.

Whilst NALP acts as an advocate for its members, striving to increase the recognition of this often undervalued profession, we are also acutely aware of the consumers that tend to use the services of a Paralegal rather than one of the more traditional, authorised legal services providers. We know from the information that we gain via our members that these are often among the most vulnerable in our society – those with little legal knowledge and very little money. With the virtual eradication of the availability of legal aid for the vast majority of legal services, there has been a huge increase in Litigants in Person and many of these will turn to Paralegals for advice and guidance through the legal maze that they find themselves in. However, we also find that we are still fighting the impression from many others in the Legal Services Sector, including the Judiciary, that a Paralegal is merely a ‘wannabe solicitor/barrister’. Even 30+ years later, this prejudice is still something encountered by our members on an almost daily basis.

In terms of the current legal services sector regulation, we can see that some change would be welcome and even necessary. We are not, however, convinced that Professor Mayson’s opinion that the benefit of the wholesale change he proposes would be worth the additional cost that would undoubtedly come with it. Our main concern is that these costs would:

- Make the business models of some smaller providers and sole proprietors unviable, forcing them to close
- Cause in-house legal teams to be downsized due to the cost of having to have each individual authorised, or, at the very least, reduce the likelihood of expansion and the availability of career advancement and corporately funded learning
- Cause solicitors to look at their staff and decide to reduce staffing levels due to the cost of having to have all individuals authorised, potentially reducing the number of paralegals, as well as trainee and apprenticeship places
- The increased costs to Professional Paralegal Practitioners would inevitably mean increased costs to the consumer, reducing their access to justice at a reasonable cost.

NALP recognises that the primary objective of the proposed reforms is to protect and promote the public interest and would agree that this should be the main focus of any statutory regulation. We are also well aware, however, that there is a great deal of unmet legal needs at this time and that the main reason so many of these needs go unmet is because of the cost of legal services.

An unavoidable fact of life is that additional statutory regulation and registration brings with it additional cost. It has been made clear that Professor Mayson expects that any future regulatory environment would be funded by those requiring authorisation. He also states that this would be a two-pronged approach, with both the organisation offering legal services and the individuals within that organisation providing those services needing to be jointly and separately registered and authorised. This will increase the cost for both the currently regulated and unregulated legal services providers.

Professor Mayson has suggested a 'bottom up' registration so that providers offering the lowest risk services could be authorised for these, but he has also stated that some of the services offered by Paralegals would fall into the higher risk categories. We recognise that more details would need to be known to understand exactly how this would work, but we are apprehensive that the very services that vulnerable consumers need may suddenly be outside of their financial reach. For instance, Professor Mayson accepts in his report that consumers who have had issues with incompetent Will-writing were just as likely to suffer these issues with regulated as with non-regulated providers. However, how many more issues is the Probate Registry likely to have to deal with if regulation forces the making of an effective Will out of the financial reach for many more consumers, who may then be inclined to write some things on the back of the proverbial beer coaster in the hope that it will suffice when the time comes? Reason would indicate that an increase in costs will result in a decrease in the ability of consumers to afford those services which will mean a lot more consumers being unable to benefit from having a valid and effective Will in place.

Professor Mayson has quoted the Law Society as saying:

"the unintended consequences could well be many small firms leaving the market, the legal sector contracting, and the cost of legal services increasing, leading to further unmet demand. There would also be serious implications for diversity, with many smaller firms having [black and minority ethnic] partners, staff and suppliers. In many cases smaller firms deal with a higher proportion of vulnerable clients, who could also be affected."

NALP agrees with The Law Society's opinion and would echo these statements in relation to Professional Paralegal Practitioners. It mirrors our experience of these issues and our anxiety around the proposals being put forward.

As Professor Mayson states, the proposals put forward in his report would need a great deal more work and consultation prior to any of these being put into place. NALP would welcome the opportunity to be part of those consultations as we do not feel that the concerns of Paralegals have been adequately presented to, or addressed by, this review.

Detailed Response to Recommendations

Long Term Recommendations:

1. NALP agrees that the primary objective of any regulation of legal services should be promoting and protecting the public interest. It should be noted that paralegals have been filling the gap left by the virtual eradication of legal aid, and the consequent reduction in access to justice at an affordable rate for many consumers, and, as such, have been helping to protect the public interest.

2. We agree that allowing access to after-the-event redress for all consumers of legal services would be an optimum outcome. However, we would caution that the cost of this system should be considered. Our concern is that if this is to be a self-funded redress system, over and above the Professional Indemnity Insurance premiums all legal services providers should have in place, then this could put a considerable burden on the lower cost legal service providers, such as Paralegal Practitioners and McKenzie Friends, etc.. This would either see them having to raise the prices to the consumer or make their business unviable. This would then, once again, reduce the access to justice at a reasonable cost that our members currently provide.
3. Whilst NALP has never been against statutory regulation for paralegals, we are concerned about the financial burden this could put on our members. We recognise that Professor Mayson has suggested a sliding scale of fees based on the risk assessment of the services being provided. However, there is still the possibility that such a scale, particularly if there is also a need for a contribution to a redress system (under Recommendation 2), could be overly burdensome for the paralegals who are currently providing the legal services to those consumers who cannot afford the more expensive regulated providers. Professor Mayson has touched on this within his report, stating that the benefit of additional regulation and consumer protection could justify this additional cost. However, NALP members are regularly working for consumers who can barely afford access to justice even at the affordable rates offered by Professional Paralegal Practitioners and any increase to those costs would, in our opinion, undoubtedly impact the most vulnerable in our society.
4. Professor Mayson has suggested that a professional title and authorisation should no longer be the basis for entry into legal services regulation. This is to ensure that the consumers are protected with at least 'after the event' access to redress, such as insurance and a formal resolution of consumer complaints. NALP broadly welcomes this as ensuring that all holders of a NALP Licence to Practise hold suitable Professional Indemnity Insurance has long been a central requirement for all applicants. In addition, NALP has a full complaints policy in place to be able to try to deal with any consumer issues. However, we acknowledge that our powers to take action against members are limited by the fact that we are a voluntary regulator. Therefore, a clear and supported redress system would have benefits to the consumer, provided that the cost of this does not make the very services it covers too expensive for them to access in the first instance.
5. Whilst a risk-based approach to the imposition of regulatory requirements is generally agreed, NALP is unconvinced that the wholesale change proposed would not reduce access to justice for consumers, particularly those of limited means, and have a knock-on effect on the smaller providers due to the additional burden imposed. NALP agrees that there is strong evidence to indicate that consumers will use those providers whose fees are not as high, many of whom may currently fall into the 'unregulated' legal sector and so would be classed as 'new' providers in the new system. We are pleased to note that Professor Mayson states "*It is important, though, that the conditions for practice are not too onerous*". However, he goes on to state that providers for the same services will be "*regulated in the same way*"; but if a firm provides a range of risk-based legal services, then surely they, as a firm, would be regulated differently and therefore the resulting costs for that regulation would be higher? If so, this would then lend itself logically to conclude that those providing lower risk legal services would be subject to lower regulatory costs and therefore would naturally charge less for their services. If Professor Mayson believes that this might not necessarily be the case, then it would be the consumer who would lose out

as they would lose that access to justice at a reasonable cost and be unable to afford the increased prices that come with the increase in regulation.

6. Risk based regulatory frameworks are, at least on paper, sound proposals. NALP agrees with Professor Mayson that any delineation between the risk levels would need to be “*nuanced*”. However, on looking at the detail of what Professor Mayson suggests may fall into “low risk” (section 4.5.3.3) and therefore attract the lowest financial and regulatory burden, we note that there are many areas of advice provided by NALP members to consumers that are currently not covered, such as Will Writing which Professor Mayson specifically states would NOT be a low-risk, after-the-event-only, service. Again, this could make the provision of much needed legal services more expensive for the consumer, reducing their access, particularly where these are currently offered via the unregulated sector, usually to a good standard and at a much more affordable price.
7. NALP agrees that the highest-risk activities should be subject to regulation, as they are now. However, the need to protect a consumer’s access to justice needs to be preserved and so, once more, it comes down to the ‘nuance’ applied to delineate between the risk levels and whether this would prevent consumers from accessing any sort of legal assistance when they cannot afford the high risk services. Currently they are able to receive at least some support and guidance from the ‘unregulated’ sector, such as Paralegals and McKenzie Friends, etc., but if all activities to do with, say, criminal cases, are pushed into the ‘high risk’ category then what happens to those paralegals who are acting as Police Station Representatives, or who licensed by the Bar Council to instruct barristers on behalf of their clients, usually at a lower cost than the ‘traditional’ law firms? This could make a number of current legal services provider businesses unviable, as well as reducing consumer choice and access to justice at a reasonable cost.
8. NALP agrees that some legal services could benefit from more during-the-event regulation, as well as after-the-event. However, without seeing the minutiae of what services will fall into this, our main concern remains that additional regulation is likely to increase costs to the point of pushing some legal services currently provided by our members, etc. out of the financial reach of the consumers who need them.
9. NALP agrees that there is a need for minimum competence levels and other conditions, such as holding professional indemnity insurance. This is supported by the fact that NALP has strict entry criteria for each level of membership and, in particular, applicants wanting a NALP Licence to Practise. In addition, as the only Paralegal Membership Body that is also a Recognised Awarding Organisation, offering regulated Paralegal-specific qualifications, we actively promote the benefits of having fully regulated qualifications, as well as some levels of membership being required to maintain CPD.

The concern is that if the requirements are too strict it could mean that some extremely experienced practitioners could lose their ability to provide their much needed services, or that it would make entry inaccessible due to the cost of gaining additional qualifications. We are therefore pleased to see that Professor Mayson does state clearly that “*accreditation should not become a barrier to entry through imposing either higher cost than necessary or higher standards of achievement than are necessary.*” However, it is difficult to ascertain the impact of this until the standards are known, which leads us to another concern around the suggestion that the LSB’s segmentation matrix should be used as a ‘starting point’.

This matrix was devised in 2012 – before the Legal Aid Sentencing and Punishment of Offenders Act came into effect in 2013, which was the catalyst for the move for consumers to seek legal

services providers outside of the traditional regulated sector. Whilst the YouGov Legal Needs Survey is more recent and may be a place to start, it is not detailed enough in respect of the legal services provided to be able to put a blanket 'risk' level attached to each area.

- 10.** NALP agrees that, if regulation is to be applied, it should cover "*advice, assistance, representation and document preparation*". However, looking at the details provided in the Report, we remain concerned about the cost of regulation and the impact that will have on both the current unregulated providers and the consumers who seek their help due to financial restrictions. It should be considered that it is the most vulnerable in our society who tend to need these services and who have the lowest available disposable income to pay for them.
- 11.** The inclusion of services such as mediation, conciliation and online dispute resolution again raises the concern of cost to the consumer and restricting their access. NALP recognises that Professor Mayson also states that cost should not be a barrier to entry, but it is unclear as to the level of cost that this regulation might incur for those providers that are currently unencumbered by statutory regulation and so can offer such services at a much lower cost.
- 12.** NALP broadly agrees that the future primary focus of regulation should be the 'provider' of legal services. We also agree that exactly what this might mean or look like in reality needs extremely careful consideration to ensure that regulation is not overly burdensome.
- 13.** NALP understands the recommendation that before-the-event authorisation should apply to individuals, rather than entities, but notes that this again raises the question of burden and cost to those entities if they have to pay for authorisation for each individual within their firm, rather than for a firm as a whole. This could increase costs and raise further barriers to access to justice for the consumer.
- 14.** NALP broadly agrees that providers of legal services should be included on a register. However, it should be acknowledged that there are already membership schemes and publicly available registers for many of the currently unregulated legal services providers. We therefore feel that this register would be better served by making membership of a suitable professional body a requirement to provide Legal Services. Those bodies could then share that information with a relevant overarching body that covers all legal services, should that be deemed necessary. To do otherwise and only have a central register, would make membership bodies, such as NALP, virtually obsolete, particularly as individuals would have to pay for the central registration and any additional regulation they come under, which would likely not leave any room for membership payments as well. This then would not only affect access to justice for consumers due to the price rises that would be inevitably introduced to account for the additional regulation, but also likely put membership bodies that currently cater for the unregulated legal sector in danger of having to close completely.
- 15.** As a professional membership body, NALP collects the details of individual members and we do not offer corporate membership. However, we do collect the employment details of our members and so, if the suggestion in 14 above is accepted, then this is information we could provide to any overarching regulator, if required.
- 16.** NALP agrees that Lawtech would fall within the definition of offering 'legal services', however our knowledge of this area is limited. As with all recommendations, however, we would raise the concern that over-regulation of such services could see the prices increase to the point that consumers cease to use them. This could leave them exposed with little to no legal knowledge whilst acting as litigants in person, or even drawing up contracts by using free examples found on the internet that may not be suitable and that could cause issues later on.

17. The use of waivers and regulatory “sandboxes” to encourage innovation in legal services does, on the face of it, appear to be a reasonable approach. However, NALP would caution against the cost that could be prohibitive for smaller providers to be able to access such a waiver or use of a sandbox which could again restrict innovation in the lower risk areas of legal services provision.
18. NALP agrees that the services offered by not-for-profit and pro-bono law centres, etc. are legal services, often including current reserved activities. It is good to note that Professor Mayson makes the point that the cost of regulation should not disincentivise such providers, and agree with the detail of the submission by LawWorks regarding the need for a more flexible and ‘light-touch’ approach that is bespoke to pro-bono and not-for-profit services.
19. Bearing in mind all of the concerns already stated in respect of the effect of costs on pro-bono providers, NALP broadly agrees with the recommendation that a separate registration for a pro-bono unit of a law firm should not be required, but be allowed.
20. Professor Mayson makes some good points about the independence of in-house lawyers and legal units and the risk that an in-house lawyer might not be able to ‘*sound alarm bells without the chilling effect of potential reprisal*’. NALP would like to raise the issue, however, of the cost of such registration for in-house legal departments and individuals. This could make some organisations consider that the cost-benefit balance is no longer weighed in favour of the benefits of having such staff directly employed. This could not only affect those who work for them in such capacities but also reduce the opportunities for training, etc. offered to staff members who might otherwise not get such a chance for career change and progression. All employees who spot an issue within their organisation are covered under the Whistleblowing laws that they can raise such issues without fear of reprisals. NALP acknowledges that this does not always happen, however, but would suggest that a strengthening of those laws and more public action being taken against organisations who flout them, could be an alternative to full regulation of in-house legal units.
21. Whilst NALP agrees that the current necessity for multifunctional legal services practices to have two completely separate business entities; one for the reserved activities, and one for providing non-reserved activities does seem a bit unwieldy, we are also concerned that the cost of regulation could reduce consumers’ access to those non-reserved activities. After all, a traditional legal services provider can undertake all of the non-reserved activities within their SRA-regulated business, but the reason that other providers decide to separate the two is, most likely, due to the monetary savings they can make which they can then pass on to their clients in the form of reasonable cost legal services. In effect, we cannot see what difference this recommendation would make to the current status quo, other than the currently non-reserved, and therefore unregulated, business would, under the proposed new regulatory framework, be subject to increased costs due to now coming under the new regulations.
22. NALP agrees that the current list of ‘Reserved Activities’ should be reviewed and that the public good or consumer protection should be high on the list of considerations when risk-rating the activities.
23. Professor Mayson states that the Rights of Audience and rights to conduct litigation should be linked and indicates that “*if the conduct of litigation in certain defined proceedings does not fall within the definition of legal services or is subject to an exemption from it, the same exclusion should generally apply to the exercise of rights of audience*”. However, this appears at odds with his earlier statement on page 161 that it “*need not follow that all rights of audience should require prior authorisation.....However, the vulnerability of parties and the relative importance of*

the issues and consequences to them could suggest a greater need in tribunals and the lower courts". Consideration needs to be given to whether such prior authorisation, which would make this a higher risk activity under Professor Mayson's recommendations, would adversely affect those same vulnerable individuals' ability to get access to justice at a reasonable cost that they can afford.

- 24.** NALP agrees that the regulator should carry out consultations about the proposed regulatory conditions. However, NALP believes that this should be a much wider consultation than just with senior judges. Such a consultation should also include those in the currently unregulated legal sector who are providing legal services to the more vulnerable in our society, and , if possible, speak to some of the clients who have accessed such unregulated services so that they can understand the full impact. NALP's concern here is that our members have reported to us previously that some judges are biased against providers such as paralegals and McKenzie Friends. There is still a huge misconception that a paralegal is just a 'want-to-be solicitor', rather than acknowledging it as a profession in its own right. This is an issue that NALP has come up against time and again over its 30+ year history and one that needs to be addressed before any new regulation is rubber-stamped by people in the more traditional, regulated side of the legal services sector. We also believe that only getting the views of one of the voluntary regulatory bodies for paralegals, as they appear to have done prior to publishing this report, will not provide the wider understanding that will be necessary when making changes that affect our members.
- 25.** NALP's response to the proposed minimum conditions for After-The-Event regulation is as follows:
- a.** NALP broadly agrees with having requirements for accreditation, depending on the detail of those requirements;
 - b.** NALP broadly agrees that there should be access to consumer complaints investigations and redress, as demonstrated by the fact that NALP has a full complaints process in place and requires all 'Licence to Practise' holders to hold sufficient Professional Indemnity Insurance;
 - c.** NALP agrees that transparency is very important within the legal sector. We require our members to be very clear as to the level of membership held, pricing and complaints policies, etc. We also provide guidance to our Members on how to set their pricing and communicate it, particularly as it is often difficult to give exhaustive details of pricing, but advise them how they might still give the general public a good indication of what they might expect to pay for the services being offered;
 - d.** NALP agrees that there must be a code of conduct, such as we have had in place since our inception, more than 30 years ago;
 - e.** NALP agrees that a suitable level of professional indemnity insurance should always be held by those providing legal services directly to clients and has this as a requirement for those NALP members seeking a 'Licence to Practise'. We would, however, suggest that some further research is done with underwriters and insurance in respect of their understanding of the different risk levels of legal services providers. We have some experience in the difficulties of getting underwriters to understand the difference between the legal services offered by our members versus those of a traditional, regulated law firm. Our fear is that the proposals will mean more confusion for those underwriters which, in turn, will lead to all Professional Indemnity Insurance premiums being increased as if they were covering the higher risk activities, with little or no reduction for those activities deemed low or medium

- risk. Any such increase in costs of premiums will, naturally, affect the costs faced by the consumers and potentially reduce their access to justice.
- f.* NALP agrees that, if there is to be a regulator for ALL legal services, then that regulator would need to have the power to take action against any providers who are not conducting themselves in a professional manner and adhering to any Codes of Conduct.
- 26.** NALP broadly agrees that the current way in which complaints about regulated legal services providers are handled should be revised as it does not appear to put the needs of the complainant first, NALP further agrees that the powers of redress should be restricted to those within the current ombudsman scheme rules.
- 27.** NALP's response to the recommendation in relation to the powers of the legal services ombudsman is as follows:
- a.* NALP agrees that there is a need for a consistent process for receiving expressions of concern that fall short of a formal complaint;
- b.* NALP agrees that, where a registered provider has had a number of expressions of concerns logged against it, the Ombudsman should be able to use its own initiative to investigate those providers. However, we would also like to see some procedures that ensure this is done on a consistent basis and cannot be misused by any individual;
- c.* NALP agrees that it would appear sensible to allow the Ombudsman to make a group determination of several complaints in relation to the same provider, with connected circumstances;
- d.* NALP agrees that complaints about the competence or conduct of a registrant should be passed to the regulator for investigation and any appropriate disciplinary action.
- 28.** NALP agrees that the regulator should have a statutory duty to apply only the minimum necessary regulatory requirements to address identified risk, in order to keep the burden and cost of regulation to a minimum. However, NALP continues to have a concern in respect of this cost and burden due to some of the statements made by Professor Mayson in relation to what activities should fall under risk levels C and B. (See Summary Response)
- 29.** NALP broadly agrees that the regulator should have, and retain, the flexibility to grant authorisation on the appropriate broad, or narrow, basis, allowing for those providers without a specific title, but who meet the conditions required for the service they wish to provide.
- 30.** NALP broadly agrees that the regulator should have power to approve appropriate routes to authorisation that could then open the way for those who already have a professional qualification and those who do not, but who may qualify in some other way. NALP would also like to see the term 'professional qualification' to be extended to more than just the traditional qualifying law degree, etc. and recognise that there are many different ways to achieve the required level of knowledge and understanding.
- 31.** NALP broadly agrees that the provision of immigration services should be regulated by the Immigration Services Commissioner and so be exempt from the future definition of 'legal services'.
- 32.** Whilst NALP broadly accepts Professor Mayson's argument that Notaries should be solely regulated by the Master of Faculties, we are not convinced that all of their duties should be exempt from the proposed legal services regulation. For instance, basic Powers of Attorney can now be applied for directly by an individual via the Government's website. However, if a copy is

required and the Donor of the POA cannot certify the copy themselves for whatever reason, currently this would have to be done by a Notary or a Solicitor, etc. This activity should be considered relatively low risk – particularly as, within a bank, the part time teller is able to certify a copy of a POA that they have taken from the original, without any specialist or legal training or qualification prior to doing so.

- 33.** NALP agrees that the current regulatory system may need to be made more cohesive, and we are not dismissive of the idea of the single regulator – the Legal Services Regulatory Authority. Our concerns over cost and implications remain, however. The Report talks about there being inefficiencies that might be helped by the merging of the current regulators into the proposed LRSA, however, the additional work that the Report suggests would also be undertaken by the new Regulator would still seem to be quite burdensome and resource-intensive. We are also concerned that this Regulator would not include individuals from the current non-regulated sector bodies. This means that the voices of the unregulated sector would not be heard when it comes to making policies and decisions about what activity comes under which level of risk, etc. If the Regulator is to be made up of only those from the current statutory regulatory bodies, they are unlikely to understand the work carried out by those in the unregulated sector, or the individuals who work within it.
- 34.** NALP understands the reasoning behind recommending that professional bodies' involvement in the regulation of legal services should 'be brought to an end'. However, as the new Regulator would be deciding on the minutiae of the regulation, policies, procedures and risk assessments of the various legal activities that will be caught by them, it needs to be asked who will speak for the providers of those services if the professional bodies are not – at the very least – invited to the table to make representations from the outset of those decisions? To use another sector's example, the Federation of Awarding Bodies does not carry out investigations or make disciplinary decisions of its members. However, it is closely involved in all regulatory changes and adaptations made by all of the qualifications regulators in the UK. Within the Legal Services Sector there are a number of professional bodies servicing the various types of providers and it is the opinion of NALP that all such voices should be heard, including where there is more than one such body per legal profession. This is particularly important as, whilst on the surface these bodies may appear to be cut from the same cloth, there are often fundamental differences to their approach and ethos. Excluding them would therefore put the members of the body which is not consulted at a disadvantage to others in the same sector. By favouring one body over another would negate the stated objective to ensure an unbiased approach.
- 35.** NALP agrees that any regulator put in place should be independent and free from any political bias or interference. NALP also agrees:
- a.** The LRSA should provide an annual report to Parliament;
 - b.** The LRSA should be subject to financial scrutiny by the National Audit Office and Public Accounts Committee;
 - c.** That the Lord Chancellor should not have general powers to direct the LRSA;
 - d.** The LRSA should have a statutory duty to advise the Lord Chancellor on appropriate matters;
 - e.** That the Chair of the LRSA should be a public appointment. We acknowledge Professor Mayson's preference for this not to be a 'lay chair', and are pleased to note that he has not excluded those with relevant professional experience and other personal qualities to be considered for this position;

- f.* That the LRSA's board should continue to have a lay majority and that the appointment of members should be an open and public process.

However, NALP would also suggest that there should be regular communication with Professional Bodies by the Board, perhaps via the establishment of a Sub-Committee to ensure that the members of those bodies are fully represented.

- 36.** NALP broadly agrees that any legal services subject to the highest-level-risk (Before-The-Event) authorisation should be confirmed by statute and any changes should be subject to consultation. However, NALP strongly believes that this consultation must take into account all providers of legal services and should not be determined only by those authorised to provide them and/or the senior judiciary. There are many factors to consider and the currently unregulated providers may have examples and evidence of where the proposed position could have an adverse effect on the consumers they seek to protect. Similarly, the consultation on the lower-risk legal services should also take into account the currently non-regulated providers, as well as those from the regulated sector to ensure all types of provision, and the impact the proposed regulation will have on the consumer, have been considered.
- 37.** NALP agrees that an independent Legal Services Consumer Panel should continue to represent the interest of consumers. NALP further recommends that the criteria for being appointed to this panel should be transparent and ensure that they reflect the regulatory system in place at that time.
- 38.** NALP agrees that there should be an independent complaints ombudsman in place that is established on an equivalent basis to the LRSA in respect of appointment of chair, board members and staff, and reporting to Parliament, with the same considerations we have indicated to Recommendation 35 above.
- 39.** Whilst NALP agrees that the current structure of 10 regulated bodies naturally leads to some duplication and cross-over of jurisdiction, we are reticent to agree entirely with replacing them wholesale with the LRSA. Our main concern will be the additional confusion for the consumer who would, for instance, be aware that they can go to the ACCA for issues with their accountant and the SRA with issues with their solicitor, but may struggle to understand that their accountant now falls within the regulator for 'legal services' when they see it as being more akin to financial services. These concerns may, of course, be allayed by the content of recommendation 40, depending on what this looks like in practice.
- 40.** The idea that the LSRA should be able to delegate or assign distinct aspects of its regulatory powers to other 'designated bodies' is an interesting one. If this maintains some of the status quo that the general public are more familiar with, then NALP agrees that this does appear to be a reasonable recommendation. However, it remains to be seen what this would look like in practice and, given that there are not only the 10 regulatory bodies that the Report refers to, but other voluntary regulatory bodies, such as NALP, it is not clear what advantage this will bring. It could also result in additional cost to the providers, which will, as previously stated, lead to increased costs to the consumer, having an adverse effect on access to justice for the more vulnerable in our society.
- 41.** Having a designated body in relation to the legal services 'for which public good authorisation is required', but one which is not separate to the LRSA would seem to be more of a 'department of' the LRSA than a separate body. If, as seems to be the point Professor Mayson is making, Advocacy and Litigation require a separate regulator, then this should be separate to the LRSA – as, for instance, the Prudential Regulation Authority is from the Financial Conduct Authority in

the financial services sector – but work collaboratively with them. NALP is also concerned that, if this Advocacy and Litigation Regulator only engages with the senior judiciary, some forms of advocacy and litigation, such as that currently provided by Paralegals and McKenzie Friends, could be drawn into this regulation. This is a concern as our members have reported to us a bias shown by judges against those who are not ‘titled’ legal services providers, even in the lower courts where this does not infringe on the current reserved activities.

- 42.** Whilst NALP broadly agrees with the recommendation for a single tribunal to adjudicate on the conduct and discipline of regulated providers of legal services, we would want to ensure that the tribunal includes individuals who have experience in the specific sector that the provider is operating in, whether that be in terms of working for larger firms of litigators, or as a sole-practitioner dealing with Wills and probate. Whilst individual bias should not be a consideration in such tribunals, logic and human nature dictate that these will play a role and so the risk should be mitigated against by ensuring a suitable panel is assembled to consider the case. Consideration should be given to having a list of suitable, independent individuals who can form such tribunals according to the case that is being heard.
- 43.** NALP agrees that the Regulator should have the power to determine the general requirements for the award and removal of professional titles, and approve the particular arrangements of professional bodies for the qualification, conduct and discipline of title-holders. However, we would also like more ‘titles’ to be recognised if all legal services providers are to be authorised by the same regulator and under the same terms. Furthermore, NALP would like to see any such regulator ensuring that all professional bodies currently serving the unregulated legal services providers are treated equally and that the Regulator does not put in any arrangements that might affect their autonomy as a professional body. NALP believes that, if there is to be a single statutory regulator, then all professional bodies should report to that regulator and not be required to sit under an ‘umbrella’ body that might act as an intermediary between them and the regulator.
- 44.** NALP agrees that legal professional titles should have the benefit of statutory protection, but, as mentioned in our response to Recommendation 43 above, we would like to see those protected titles to be expanded to include other legal professions, such as paralegals, to ensure that all such providers are afforded equal protection. We also feel that this would assist in providing the consumer with a clearer understanding that such professionals are authorised and regulated under the new regime.
- 45.** NALP agrees that the minimum requirements of after-the-event regulation should, in principle, apply to all registered providers of legal services, and that the Regulator should have the power to appoint a non-legal regulator (e.g. ICAEW) of registered persons to be a ‘designated body’, allowing consumers access to the Legal services ombudsman.
- 46.** NALP strongly supports any expansion to Legal Professional Privilege and feels that this should include those currently ‘unregulated’ providers, such as paralegals, who provide legal advice directly to consumers. Currently, the position of legal professional privilege is unclear, even for those unregulated providers who provide advice and even advocacy to their clients. This was, in fact, the subject of an article written by two of NALP’s directors for The Barrister in January 2020 <http://www.barristermagazine.com/legal-professional-privilege-and-paralegal-lawyers-does-it-apply-should-it-apply/>

Short Term Recommendations:

- S1.** NALP is generally supportive of the idea of a public register of all legal services providers, including those who provide non-reserved activities in the unregulated sector and it is logical that this should be overseen by the Legal Services Board. We believe this should be particularly aimed at those who provide such services directly to consumers. To this end, the LSB could enlist the aid of professional bodies such as NALP who could provide the details of our National Paralegal Register. However, it should be noted that there are many providers who are not members of a professional body and so some thought should be given to ensuring that the public are made aware of this register in order for it to provide some of the assurance and protection that Professor Mayson states is the objective. Another consideration would be how such an expansion would be financed as any increase in costs to such providers would undoubtedly have a knock-on effect on the fees charged to the consumer which, in turn, is likely to have an adverse effect on access to justice at a reasonable cost.
- S2.** NALP broadly supports the expansion of the Legal Ombudsman so that it can also deal with complaints by consumers against registrants on the same basis as authorised persons. We would, however, like to know how this would be financed as we have continued concerns about the impact this might have on consumers' ability to gain access to justice.
- S3.** NALP agrees that immigration services and advice should be excluded from this as they are covered by the fact that all such advisers must be authorised by the OISC (unless an authorised person under Legal Services Act 2007).
- S4.** NALP agrees that paid McKenzie Friends should be included in the registration scheme. We also broadly agree that judicial discretion should be used to decide the matter of rights of audience on an individual basis for, not only McKenzie friends but also, Professional Paralegal Practitioners.

**The Directors of NALP (National Association of Licenced Paralegals)
26th August 2020**

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