Consumer protection for post six-year negligence

Consultation responses

February 2023

Consultation responses

These respondents, listed in the order in which they responded to the consultation, asked us to name them and publish their responses. The text of their responses follows the list of names.

Ian Gillam

Vivien Stern

Elizabeth Perkins

Andrew Melling

Aimee Talbot

Terrie Pridie

Newcastle upon Tyne Law Society

Fiona Swann

Alan Edward Short

Yorkshire Union of Law Societies

Dorset Law Society

City of London Law Society

William Davis

Institute and Faculty of Actuaries

Legal Services Consumer Panel

Liverpool Law Society

Joint V Law Societies

Janis Purdy

The Law Society

Association of Personal Injury Lawyers

Bristol Law Society

Birmingham Law Society

Consumer protection for post six-year negligence consultation

Response ID:17 Data

2. About you

1.
First name(s)

Ian

2.
Last name

Gillam

3.
Please enter your SRA ID (if applicable)

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Member of the public

3. Consultation questions

9.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

If this is intended to be a post six year indemnity against negligence only, which the current Rules are not, then it must be sensible to say so. Currently Rule 8.5 of the Rules SIF 2012 opens the indemnity to claims for dishonesty amongst other things by virtue of Rule 9.3 ruling out exceptions for an expired run off claim made under Rule 8.5, or PSYROC as it now seems to be called. This has not been altered in the new draft SRA Regulations.
Furthermore you have redrafted the arbitration rule 15.1 to exclude the President of the Law Society which is sensible as he/she would always be acting under a conflict of interest. You have obviously redrafted the whole of 15.1 in an attempt to limit arbitration between a person, who is provided with indemnity, and the SRA. I suspect what you actually mean is not a person but an authorised person ie a regulated member. A person can be anyone who seeks the benefit of the indemnity and is not defined at all in the glossary other than to include the plural, person(s). In fact I think the whole indemnity scenario needs to be dropped in favour of post six year insurance. Negligence is what you are trying to insure against after all other polices, whatever you like to call them, have expired. Indemnity is something utterly different. The Rules need to be rewritten to provide what you are attempting to create. A mish mash of the current Rules is quick and cheap but only lays the ground for more ambiguity. It would be in the SRAs advantage to take the time to carefully draft this all again and I am sure members would be pleased to see the whole matter clarified. You could also then make it clear to the public what they can expect to claim under this new post six year negligence insurance and how to go about making a claim.

Finally I do not know where all this leaves the Compensation Fund. An application to them is not attractive as they can simply say no and walk away. The SIF rules come into force when any person makes any claim against the indemnity. If there is a dispute then the matter goes to arbitration which, from personal experience, the SIF attempts to avoid at all costs. However there is nothing to prevent a claimant against the Fund from going to the law to seek recourse for their loss.

10.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

This whole thing is a mess affecting the provision by the SRA of insurance to protect their members but it is massively inward looking and the public have not been given any say- difficult to arrange I admit. The SRA protect its members exclusively and not the public. Just read the SRAs Trustpilot reviews which are shameful. This its a fantastic opportunity for the SRA and Law Society to address openly and transparently their appalling reputation, admitting that ethics is a problem most helpfully confirmed by the new President of the Law Society at the LSBCP conference on 13 October this year and others on the panel. It is not for me to comment on the SRA Regulations themselves which is a stakeholder matter, but now is the time to say " OK we got it wrong. We have concentrated far too much on our members and are now looking to readdress our relationship with the public starting with a root and branch review of how we protect the public against negligence and dishonesty."

One final point - next page " Help us track our Equality, Diversity and Inclusion." All very laudable but where is ethics? Ignored as usual!

Consumer protection for post six-year negligence consultation

Response ID:31 Data

2. About you

1.
First name(s)

vivien

2.
Last name

stern

3.
Please enter your SRA ID (if applicable)

123692

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

No

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

9.
Please specify if you are

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I am delighted that the SRA has recognized the need for these rules and arrangements for PSYROC

12.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

As in 1)

Consumer protection for post six-year negligence consultation

Response ID:32 Data

2. About you

1.
First name(s)

Elizabeth

2.
Last name

Perkins

3.
Please enter your SRA ID (if applicable)

118433

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

Self employed locum

9.
Please specify if you are

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I am delighted that the need for PSYROC is acknowledged- it's very much in the public interest and will provide reassurance to clients

12.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

Not as yet

Consumer protection for post six-year negligence consultation

Response ID:33 Data

2. About you

1.
First name(s)

Andrew

2.
Last name

Melling

3.
Please enter your SRA ID (if applicable)

100151

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

retired

9.
Please specify if you are

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The SIF works but will close in September 2023. SRA must apply to LSB for a rule change to allow a new scheme. SRA should instead apply to LSB for an extension of the existing scheme. That would save the doubling of claims handling costs identified in the consultation paper.

12.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

no

Consumer protection for post six-year negligence consultation

Response ID:35 Data

2. About you

1.
First name(s)

Aimee

2.
Last name

Talbot

3.
Please enter your SRA ID (if applicable)

506496

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

Reynolds Porter Chamberlain LLP

9.
Please specify if you are

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

In my view, it would be helpful to expressly state in the rules that the part of the SRA responsible for operating the indemnity scheme is separate from the part of the SRA responsible for enforcing the conduct rules - this is to reassure solicitors that the SRA is mindful of the possibility for conflict where a claim notified to the indemnity fund gives rise to disciplinary issues. I see that it is proposed that rule 18 will be removed in its entirety: I consider that it should be retained but modified to provide that the listed issues are ones that the SRA will be entitled to refer to its regulatory/enforcement function for consideration -this will make

it clearer to solicitors what the SRA will do with information concerning them/their practice.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

I would be interested to know more about the SRA's proposals for keeping its operation of the proposed indemnity fund separate from its regulatory/enforcement functions. Any crossover has the potential to disproportionately affect older solicitors, and those from a Black, Asian or minority ethnic background because (according to the equality assessment) these solicitors are more likely to have worked in a smaller closed practice eligible for cover under the indemnity fund. This is because the SRA will have access to information that it would not otherwise have. Hence why there needs to be a robust information barrier system.

Consumer protection for post six-year negligence consultation

Response ID:46 Data

2. About you

1.
First name(s)

Terrie

2.
Last name

Pridie

3.
Please enter your SRA ID (if applicable)

37612

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

Get Power of Attorney

9.
Please specify if you are

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

no, it seems that the draft rules protect the general public and members of the profession. I welcome the new scheme that is proposed through the Law Society. It is a massive relief that a solution has been found which benefits everyone.

12.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

no

Consumer protection for post six-year negligence consultation

Response ID:57 Data

2. About you

1.
First name(s)

Kate

2.
Last name

Goodings

3.
Please enter your SRA ID (if applicable)

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Newcastle upon Tyne Law Society

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

This has been a tortuous process and we pleased that the present uncertainty as to the continuation of post six year indemnity cover is close to being resolved. It is clear there has been a genuine effort to deal with the concerns expressed by the profession.

Nevertheless members do still have concerns particularly around the lack of expertise and resource in the SRA and over the control of costs. The Newcastle Law Society has consistently opposed the closure of SIF in the context of PSYROC and has supported the continuation of an indemnity scheme, while being concerned as to the potential financial burden on our members who may be involved in arrangements for its continuation. Our position is therefore predicated on the costs of continuing cover for each firm not exceeding £240 per annum and the efficiencies being achieved necessary to achieve this.

We have considered the response to the proposals submitted by the Law Society and endorse their identification of elements of the proposals which ought to be considered in more detail. It is essential that the SRA continues to work with the Law Society in this regard.

In particular:

(a) How the fund is managed and how efficiencies are achieved
(b) The details of the levy on individual firms
(c) Issues arising from the SRA's disciplinary role

11.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

Consumer protection for post six-year negligence consultation

Response ID:58 Data

2. About you

1.
First name(s)

FIONA

2.
Last name

SWANN

3.
Please enter your SRA ID (if applicable)

126035

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

No

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Other

8.
Please specify

retired solicitor

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

My comments on the latest consultation exercise cannot be confined within replies to the SRA's two questions.

1 The SRA is to be commended for acknowledging that it had underestimated the damage that would be inflicted on clients if SIF had closed without alternative protections being in place. (NB I will use the term "client" because it is easier to say eg "a former client of a closed firm" than "a consumer who instructed a firm which subsequently closed".)

2 Unfortunately that acknowledgement appears to be only skin deep because throughout the "consultation" documents the SRA repeatedly uses the same terms it used when justifying its position to close SIF eg proportionality, cost effective etc. The SRA has for many years now refused outright to address the issue of the fairness of its regulatory treatment of former clients of closed

firms and of clients of continuing firms. Unfortunately, despite referring to protection of former clients as being a regulatory matter the SRA is proposing via the new indemnity rules to reserve to itself the right to close SIF if it considers that SIF is eg too expensive. If the SRA wishes to treat former clients equally with all other clients it would not want this power without committing to a simultaneous review of its entire PII requirements. The current PII requirements are very expensive. To be clear, I am not saying that there should be no negligence protection, far from it; I am saying that the SRA should not be able to claim that one form of protection is not required because it is expensive whilst simultaneously insisting on another equally expensive form of protection.

Therefore, the SRA should now openly acknowledge that proper, equitable regulation requires that the two sets of clients have the same level of protection. If this is not forthcoming the SRA should justify why it does not consider that to be a proper regulatory approach.

3 The other protection issue is that of solicitors on which this consultation is largely silent. That is, of course, to be expected as the SRA is a regulator, not a representative body and has no powers in relation to such protection. However, the SRA has chosen to bring SIF in-house and it has to find a solution to this issue or acknowledge that its view is that solicitors' interests are not important. If it does acknowledge that, the SRA is not fit to run SIF. SIF was set up to provide indemnity for solicitors – hence its name "Solicitors Indemnity Fund". Solicitors paid into the Fund and are entitled to expect that their money is used for the purpose for which it was paid. My next paragraph set out a proposed solution to this self imposed problem.

4 I suggest that the new SIF management team includes solicitors with practical insurance experience. They will be able to speak for solicitors and systems will have to be put in place whereby their voices are heard and acted on.

5 In addition the new Solicitors Indemnity Rules, in particular the last rule (16), should include a requirement that the SRA act "reasonably" when carrying out its SIF functions. The SRA has chosen to step outside of its regulatory role in taking over the running of SIF and has to accept the consequences of that. I do not see how it can truly object to this proposal as it cannot be intending to act unreasonably in running SIF. It has the power to do this conferred by S28 (3) (b) of the Legal Services Act ie to act reasonably must be best regulatory practice. The SRA and Society could agree which of the proposed rules could be improved by the insertion of this wording.

6 In conclusion, I do not agree that SIF being run by the SRA is a good idea nor that doing so will lead to the expected costs savings. The SRA already has the standing to monitor how SIF is run but it has chosen not to do so. I fear that it will find that it has bitten off more than it can chew and will, in the future, once again seek to close SIF as a means of extricating itself from a difficult position.

11.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

See above

Consumer protection for post six-year negligence consultation

Response ID:68 Data

2. About you

1.
First name(s)

Alan Edward

2.
Last name

Short

3.
Please enter your SRA ID (if applicable)

100903

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Solicitor

8.
Please enter the name of your firm/employer

Alan E Short

9.
Please specify if you are

an in-house solicitor

3. Consultation questions

11.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

1. The scheme should be permanent with no sunset clause or similar.
2. The scheme should never be merged with or become part of the compensation scheme.
3. That all types of clients should be able to claim against the fund without restriction.
4. That the scheme should continue to provide the same protections for consumers and solicitors as has been provided

by the SIF

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

No, provided the above points are fully taken into consideration.

Consumer protection for post six-year negligence consultation

Response ID:70 Data

2. About you

1.
First name(s)

David

2.
Last name

Barraclough

3.
Please enter your SRA ID (if applicable)

98248

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Yorkshire Union of Law Societies

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The Yorkshire Union of Law Societies ("the YU") is responding to this consultation as the umbrella organisation for all the local law societies in Yorkshire. The response to this consultation has not been discussed in detail with the members of the YU but the issue of consumer protection for post six-year negligence has previously been discussed at meetings held by the YU and the overwhelming consensus of opinion was against the closure of the Solicitors Indemnity Fund ("SIF") and that protection should remain in place for consumers of legal services or their beneficiaries in the event that claims arise more than six years after a firm has closed without a successor practice.
The YU considers that in principle the proposed arrangements for post six-year run off cover scheme ("PSYROC") set out in the SRA's consultation could be made to work as the basis of a satisfactory alternative to the SIF if the points below are fully addressed. The YU is aware that since the publication of the SRA consultation the Law Society ("TLS") has been in discussion

with the SRA in relation to the proposed arrangements and in relation to the reservations held by TLS in respect of the proposed arrangements.
The YU shares a number of those reservations in particular:-
1. Termination of the fund.
At present though the determination of the need and appropriateness to continue to hold and administer the fund is delegated as a regulatory decision by TLS to the SRA the proposed arrangements would transfer that decision-making power direct to the SRA. In addition, the proposed arrangements provide that the SRA rather than TLS would determine the residual use of any balance of the fund if it was determined no longer necessary or appropriate that the fund should be maintained for indemnity purposes. The YU strongly considers that given the fund represents contributions made by TLS members and given the reasons for previously agreeing that the power and function to make decisions about the residual use of the fund should remain with TLS, the proposed arrangements should respect and retain that historic arrangement.

2. Management of the fund.
The YU considers that it is fundamental that the proposed arrangements should include provisions detailing how the fund is to be managed and administered. The cost and administration of the fund was cited in the initial discussions concerning the intention to close the fund. It is essential that the SRA should set out now their proposed approach to the maintenance and use of the core capital of the fund. If the future of the fund will involve a potential top-up levy on the profession to ensure the ongoing maintenance of the fund, it is essential that the SRA demonstrates now how it will guarantee that the fund will be managed and administered in an efficient, cost-effective and transparent manner. The YU notes the SRA states "we would consult on the structure and mechanics of any levy for post six-year consumer protection before collecting a levy for the first time" but nevertheless considers that such consultation should effectively be done now as part of the transfer of the funds from SIF and that a levy should be made from the outset in order to maintain the fund at its current level rather than wait for funds to become depleted before a levy is made. The profession has already indicated in principle its willingness to contribute to PSYROC. The YU shares the view of TLS that "The basis for levying the profession needs to be established, and we would expect the capital in the fund to be preserved close to its current level, while operational costs and claims would be paid from annual investment income or gains." "Maintaining a large fund would provide a buffer in the event of large or high-volume claims and avoid the wide fluctuations that the profession has experienced in relation to Compensation Fund contributions over the years." Clear intentions and objectives and total transparency are essential from the outset.

3. Conflict of interest.
The YU is concerned by the potential conflict of interest which may arise in instances where the SRA is acting as both the professional disciplinary body and the provider of indemnification given that the proposed arrangements provide that those seeking indemnity would have to provide all relevant information to the SRA as regulator. That could result in those seeking indemnification being reluctant to discuss their cases fully and freely. The YU acknowledges that the same problem already arises now in relation to claims to the Compensation Fund and that in discussions the SRA has indicated to TLS that it will adopt the same approach to PSYROC claims as it does to Compensation Fund claims. The YU considers that the SRA should highlight this confirmation as a matter of strict principle in the proposed arrangements.

4. Arbitration
The YU shares the view of TLS that if under the proposed arrangements an arbitrator is required to be appointed in the event of dispute that responsibility should remain with the President of TLS and should not be transferred to the SRA.

5. "Decisions by the Society"
The YU shares the view of TLS that given the provisions under the current arrangements which grant the SRA, exercising the regulatory powers of TLS, the ability to treat a person who has failed to comply with the rules as having acted in compliance where such non-compliance is regarded by TLS (again in practice by the SRA exercising the regulatory powers of TLS as being insignificant) those provisions should be repeated under the proposed arrangements on the basis that the proposed arrangements are intended to provide the same protections as are offered under the current arrangements.

6. Reporting.
The YU shares the view of TLS that the requirement under the current arrangements for SIF Ltd to produce reports to TLS about the management and administration of the fund, including recommendations about the level of proposed levies, should be retained and preferably enhanced under the proposed arrangements. If the members of TLS are to be required to contribute

levies to maintain the fund it is vital that the management and administration of the fund by the SRA is totally transparent.

11.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

Subject to the concerns set out above in response to Question 1 being fully addressed in the proposed arrangements, the YU has no specific comments save that the YU considers it is essential that the proposed arrangements are totally transparent and provide at least the same level of protection as the existing arrangements

Consumer protection for post six-year negligence consultation

Response ID:73 Data

2. About you

1.
First name(s)

Martin

2.
Last name

Varley

3.
Please enter your SRA ID (if applicable)

132035

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

Dorset Law Society

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The Dorset Law Society's membership broadly concurs with the SRA with the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme. PSYROC provides necessary protections for consumers of legal services and solicitors.

We are concerned that large organisations, such as estate agents with country-wide reach, are influencing their customers to use entities providing property-related services. There is a lack of transparency in the commissions or share of the profits of the conveyancers received by the estate agents. If estate agents were undertaking financial services activities, such organisations would be in breach of the FCA's regulatory regime.

The firms of solicitors and licenced conveyancers effectively controlled by large organisations to provide legal services at knock down rates consistently provide a poor service. Many cease to operate due to 'Tesco' business model leading to financial failure. Professional services are not commodities.

The public perception of the Solicitors' profession may be adversely affected by the failure of non-authorised limited liability organisations that prove to have no long-term cover. Therefore, the benefit of the cover provided by the new scheme must be evident to consumers. The Dorset Law Society urges the SRA to discuss the proposals of the Law Society in the way best suited to achieving the protection of the consumer.

The Dorset Law Society's membership support the approach of the Law Society to the impact of the proposals. We believe that there should be no reduction in the scope of cover for consumers, from what is currently provided by the SIF.

11.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

No.

Consumer protection for post six-year negligence consultation

Response ID:75 Data

2. About you

1.
First name(s)

Clare

2.
Last name

Wilson

3.
Please enter your SRA ID (if applicable)

144422

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

No

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Law society

8.
Please enter the name of the society

City of London Law Society - CLLS

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

• The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Professional Rules and Regulation Committee.

• The CLLS participated in the SRA's consultation of 23 November 2021 "Post six year run-off cover and the Solicitors Indemnity Fund" with its response of 15 February 2022, and in the SRA's discussion paper published on 3 August 2022, "Next steps on the Solicitors Indemnity Fund (SIF) and consumer protection for negligence claims" with its response of 31 August 2022. As

reflected in Annex 1 to the current consultation, our key message has been that while the legal profession would in principle be willing to fund the cost of ongoing consumer protection via a levy of the nature and at the cost consulted on in the November 2021 paper, and would not expect this cost to be passed on to consumers of legal services generally, support for post six-year cover is not unqualified, and that when considering any levy, the SRA must be proportionate and take all relevant factors into account.

• The CLLS encouraged the SRA to consult on ideas to provide consumer protection in the most efficient and cost-effective way. At the outset of this response, we observe that the SRA has nevertheless already decided without proper consultation that it will (a) maintain consumer protection for PSYROC as an SRA regulatory arrangement "providing the same level of cover as the SIF"; and (b) "provide this protection through an indemnity scheme operating under the direct control of the SRA". It appears that the SRA has based this decision largely on the further work it has commissioned from Willis Towers Watson ("WTW") included at Annex 2. Yet the consultation paper also explains on page 8, "We currently have little data on the nature and circumstances of claims made to the SIF. This makes it difficult to assess the impact a change to its terms of cover would have on consumers". With respect, and appreciating that this appears to be in part due to SIFL itself holding a limited range of data, this suggests that even at this stage in its process, the SRA is still lacking in material information relevant to how it develops policy in this area. As such, it is difficult to have confidence in the SRA's statement that "an indemnity fund run by the SRA could save between £300,000 and £400,000 a year" in claims handling costs, and the SRA's prediction that bringing SIF into the SRA should cost less than if PSYROC were to continue to be provided through SIFL.

• These concerns and the inherent uncertainty in forward-looking estimates make it all the more important that the SRA keep the case for PSYROC under adequate, transparent scrutiny so that the scheme is in fact run as a proportionate regulatory arrangement. We invite the SRA to include a specific periodic review provision in the proposed Rules, and for this purpose suggest that such period be set expressly at 18 months, which would give the SRA an opportunity to gather data based on its own practical experience. Such review should include consideration of the Rules, including the scope of the exclusions under Rule 7 and whether any other categories of claim may need to be included, having regard to affordability and the overall regulatory case. We suggest that the mechanism for review and amendment be clear in a preamble/end note to the Rules.

• We welcome the SRA's assurance that if it decides to impose a levy on the profession in the future to help fund post six-year consumer protection, it will consult on its structure and level and consider the regulatory implications for regulated individuals and firms then, before collecting any levy for the first time. We have interpreted this assurance as relating to the SRA's powers under proposed Rules 14 and 15.2(a), before any exercise of those powers.

• While the SRA must operate the scheme in accordance with the relevant legislation and public law principles (including acting rationally in a way that a reasonable regulator responsible for managing funds would act), we suggest including expressly a duty on the SRA to have regard to standard investment criteria and to take proper advice from a suitably qualified person in its management of the scheme's funds. This would include, where it exercises its proposed investment power under Rule 15.2(b), having regard to the suitability of investments by reference to the overall risk level of the whole portfolio, rather than just the risk profile of individual investments. It would also include reviewing the scheme's investments in accordance with the standard investment criteria from time to time.

• We invite the SRA to consider broadening Rule 16.1 to ensure that the SRA has sufficient power to terminate the arrangements in the event that they cannot be run in a proportionate way or become disproportionate or unfair, including from the perspective of how costs are carried across different groups in the profession as against the benefits.

11.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

No

Consumer protection for post six-year negligence consultation

Response ID:76 Data

2. About you

1.
First name(s)

William

2.
Last name

Davis

3.
Please enter your SRA ID (if applicable)

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

Yes

6.
I am responding..

in a personal capacity

7.
In what personal capacity?

Other

8.
Please specify

Retired Solicitor

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I have read and support the Law Society response of 15 December 2022. I would urge the SRA to consult with the Law Society regarding the details and transfer of the arrangements and not to ignore the experience of SIFL.

11.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

No.

Consumer protection for post six-year negligence consultation

Response ID:77 Data

2. About you

1.
First name(s)

Steven

2.
Last name

Graham

3.
Please enter your SRA ID (if applicable)

5.
Would you like to receive email alerts about Solicitors Regulation Authority consultations?

No

6.
I am responding..

on behalf of an organisation

7.
On behalf of what type of organisation?

Other

8.
Please specify

Institute and Faculty of Actuaries (membership body for actuaries)

3. Consultation questions

10.
1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

(GENERAL POINTS)

1. The Institute and Faculty of Actuaries (IFoA) welcomes the opportunity to respond to the Solicitors Regulation Authority (SRA)'s consultation on Consumer protection for post six-year negligence. The IFoA is based in the UK and is a royal chartered, not-for-profit, professional body, representing and regulating over 32,000 actuaries worldwide. We responded to the SRA's earlier consultation on Post six year run-off cover and the Solicitors Indemnity Fund.

2. As was also the case in drafting our previous response, we have drawn upon input from IFoA members working for consultancies advising general insurance clients.

3. There is a clear parallel with the SRA's public interest role as a regulator with the IFoA's own regulatory responsibility. At the IFoA we have a public interest responsibility to regulate our members in such a way to assure public trust, but with this balanced with supporting business and innovation.

4. Consistent with the IFoA's own public interest obligations, and as with any IFoA consultation response, we have considered the SRA's proposals from an independent, public interest perspective.

5. We note that in developing its latest proposals, based on the responses to the earlier consultation, the SRA has recognised that that negligence emerging more than six years after a firm closes can cause significant detriment to the small number of consumers affected. We note further that the SRA Board has agreed that the SRA should make regulatory arrangements for post six-year consumer protection if it can be delivered in a way that:

• provides appropriate protection for consumers;
• is appropriately governed and consistent with other regulatory arrangements;
• is cost effective;

….and is therefore a proportionate regulatory arrangement.

POINTS IN RESPONSE TO Q1

6. In our response to the SRA's 2021 consultation we commented on potential funding arrangements including the option of merging the SIF and the Compensation Fund (CF). We note that SRA have discounted using a compensation fund and its Board decided in September 2022 to provide consumer protection through an indemnity scheme controlled by the SRA.

7. Our response to the earlier consultation also noted that the average claim of £34,600 may be significant or at least non trivial to most individual consumers, even after deducting defence costs. In addition, those seeking compensation may be in a vulnerable state financially, or mentally.

8. In addition, we were not convinced that the need for an annual levy of £16 per solicitor, if passed on to the consumer, could be described as having a negative impact on a large number of consumers.

9. We further suggested that, if decisions about SIF's future were made later than 30 September 2022, then a further limited extension of PSYROC could be considered in the interim.

10. Given this range of points, we therefore welcome the SRA's decision to seek a 12 month extension (to 30 September 2023) to the deadline for new claims to be notified to SIF, and to make regulatory arrangements for a continuation of consumer protection.

11.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

11. We support the SRA's aims set out in paragraph 5 of our response above. We are not in a position to conclude on whether the option chosen would meet these objectives, however, as it is not clear to us whether a number of relevant factors have been considered in detail.

12. In particular, we suggest that, given the long-term nature of the liabilities, the SRA also considers the following aspects:

• the long-term financial sustainability of any arrangement put in place including;
• the equity of any funding arrangement across cohorts/generations of solicitors;
• the extent and implications of unfunded PSYROC claim exposures to the public over time
• any applicable insurance regulations.

Sent by email only to postsixyear@sra.org.uk

3 January 2022

Dear Sir/Madam,

The Legal Services Consumer Panel (the Panel) welcomes the opportunity to respond to the Solicitors Regulation Authority's (SRA's) consultation on consumer protection for post six-year negligence.

The Panel has responded to previous consultations and discussion papers on the future regulatory arrangements for the Solicitors Indemnity Fund (SIF). We have consistently argued that arrangements should be maintained to compensate consumers who suffer loss from the negligence of a solicitor but cannot claim under the law firm's indemnity insurance. We have strongly asserted that if SIF were to close without equivalent protection, the impact on consumers, even if these were small in numbers, would be significant.

As well as responding to consultation and discussion papers, we have had numerous meetings, at varying levels, with SRA colleagues. We commend the SRA for this extensive engagement, but more importantly, its willingness to listen, reconsider and develop a solution which we now believe strikes the right balance between consumer protection and affordability.

The Panel agrees with the SRA's key decisions which are:

- To maintain consumer protection for post six-year negligence as an SRA regulatory arrangement, providing the same level of cover as SIF; and
- To provide this protection through an indemnity scheme operating under the direct control of the SRA.

We have noted some areas for further consideration below

Notifications

We note that the current SIF rules require that claims be "notified" to SIF Ltd, while the new scheme requires that claims be "notified in the prescribed form" to the SRA. It is important that the SRA ensures that this 'prescribed form' is simple and straightforward. More importantly, the reference to 'prescribed form' should not exclude substantively legitimate claims.

We are also of the view that if the 'prescribed form' is a document eg a formal form, this should be tested with consumers to ensure comprehensibility and accessibility,

before the form is published. The SRA should also produce a clear guide on how to complete the prescribed form (with Frequently Asked Questions as they emerge),

Using Claims Data effectively

We agree with the SRA that one of the current weaknesses of SIF is its incapacity to collate and analyse data effectively, particularly as such data can be used to mitigate future risks and raise standards in the sector. We are therefore of the view that data collection and analysis must be a priority for the new indemnity arrangement. Equally important is the need to be transparent about the analysis. To this end we strongly believe the SRA should publish an annual report detailing the types of claims that the fund has handled, the range of compensation awarded and the segments of consumers impacted. This report should be used as an opportunity to disseminate or share lessons that could reduce the risk of similar claims arising in the future.

Should you have any questions pertaining to this response, please contact Lola Bello, Consumer Panel Manager (lola.bello@legalservicesconsumerpanel.org.uk)

Yours sincerely,

Sarah Chambers
Chair
Legal Services Consumer Panel.

Liverpool Law Society Response to the SRA Consultation document – Consumer protection for post six-year negligence: Consultation

LLS represents over 2,000 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This paper has been produced by the Society's Regulatory Committee. It sets out the LLS response to SRA's consultation, "Consumer protection for post six-year negligence: Consultation".

Whilst LLS welcomes the decision of the SRA Board to preserve the indemnity scheme to provide consumer protection for post six-year negligence and to maintain the same level of cover as currently provided under the existing indemnity fund rules, it is concerning that the SRA has not consulted with the profession about how the scheme would operate going forward, instead electing for a scheme operating under the direct control of the SRA. Of more concern is that the basis for that election -for a scheme managed and controlled by the SRA as opposed to an alternative- does not appear to have been properly thought through. In the consultation we are told that the SRA Board was mindful that the new arrangement needed to be cost-effective, "*particularly in comparison to the current running costs of the SIF and that the Board took this into account in assessing the options for delivering future consumer protection*". We are further directed to the report commissioned from Willis Towers Watson dated October 2022 ("the WTW Report").

Attached to this consultation response is a letter to the SRA prepared on behalf of Birmingham, Bristol, Leeds, Liverpool and Manchester Law Societies, known collectively as the Joint V. We endorse the points raised in that letter. By way of elaboration:

- The WTW is in essence a comparison between a reconfiguration of the current scheme operated by the Solicitors Indemnity Fund Limited ("SIFL") and a new indemnity fund managed within the SRA utilising the claims experience from the SRA Assigned Risk Pool ("ARP") as the comparator. The ARP is not a true or appropriate comparator. The ARP handled claims against firms who were unable to obtain insurance on the open market, with those firms moving out of the ARP after a finite period of time or closing down. SIF manages a fund of last resort, making the claims profile significantly different. We commented in our response to the SRA Consultation: Post six-year run-off cover and the Solicitors Indemnity Fund that there had not been sufficient analysis by the SRA of the impact and complexity of long-tail claims and it appears that in considering the future of the fund the SRA and the authors of the WTW report have fallen into the same trap. It is impossible to assess the costs of claims without a proper appreciation of the nature of the claims. Post six-year run-off claims are by their very nature stale, by which we mean there is a considerable time lag between the date of the negligent act or omission, the cessation of the firm and the claim being made. This makes their investigation complex and time consuming and the costs of that investigation invariably falls to SIF.

- One criticism of the existing arrangement is that the costs of defending the claims is disproportionately high when compared with the claims paid figure and it is this criticism that is used to lend support for a change of approach. This analysis is flawed and demonstrates a fundamental lack of understanding of the nature and complexity of PSYRO claims. Defence costs spend is high because a disproportionate number of the claims are advanced by litigants in person and, as already mentioned (and this applies equally to cases where the claimant is represented), the majority of the investigation work and time required to ascertain the validity and merits of the claim and to explain it to the claimants falls to SIF. The imbalance is also in part due to the high proportion of claims that are refuted. Of course, it is possible to balance up the figures by paying claims that are not meritorious or by not investigating the claimant's version of events in circumstances where the investigation looks time consuming and difficult but isn't that just a discretionary compensation fund by another name?

- The suggestion in the WTW Report that (a) the claims could in part be handled by the SRA Client Protection Team and/or as part of the SRA's existing arrangement with Polo Commercial Insurance Services Limited (POLO) supports our view that there is no proper appreciation amongst the SRA and its advisors of practical reality of managing PSYRO claims. What is

required is experienced professional indemnity practitioners. Deploying staff that are inexperienced in this field will either lead to an increase in defence costs or an increase in claims payments, neither of which is desirable. We asked the question: is what is being proposed in reality a slashing of defence cost spend at the expense of a proper enquiry into the merits of the claims? The comments in the WTW Report about SIF's panel costs being high and the proposed new claims assessment framework including fixed-fee arrangements with existing (POLO) or new providers tends to suggest that it is. The notion that experienced professional indemnity practitioners could be engaged to conduct these claims for a low fixed fee or indeed for rates that are significantly less than those paid SIF is naïve, particularly if it is also intended that a proportion of what are very few claims will be dealt with in-house. We also take issue with the implication that panel costs are high. For the reasons set out above, it is accepted that defence costs are high in comparison to damages paid but it is not accepted that panel hourly rates are high or even above or at market average.

In summary the stated and implied rationale for an SRA operated fund is flawed and should be revisited before consideration is given to amendment to the scheme rules and what follows is not intended to detract from that primary contention.

Q1: Do you have any comments on the draft rules and arrangement for implementing the SRA-controlled post six year indemnity scheme?

LLS are pleased to see that minimal changes are proposed to the Indemnity Fund Rules and that for the most part the revisions are to replace reference to SIF with the SRA. However, in the following three instances the changes are fundamental and do raise concerns:

(i) Clauses 6.1 (b), 6.1 (c) (ii) and 6.5(a) of the new draft rules provide that notification of a claim or circumstance must be made in a prescribed form, though no draft is provided. Further draft rule 6.5 appears to impose a retrospective requirement for use of the prescribed form, which cannot be right. Although the provision of prescribed information in a prescribed format is undoubtedly desirable to assist with the effective triaging of claims and circumstances, this goes beyond what is currently or has ever been required to make an effective notification under the MTCs.

It is also important to bear in mind that notifications may be made by solicitors and their staff, or even claimants, who are elderly or under a disability. Barriers should not be put in the way through an over-rigid notification process.

(ii) *Clause 13.1 of the new draft rules contain provision for any dispute over the defence of a claim or cover as follows –*

'13.1 If a dispute arises between:

(a) a person who seeks indemnity from the fund in accordance with these Rules,

and

(b) the SRA

concerning any claim or the quantum of any claim that is the subject of the indemnity being sought from the fund by the person and the SRA shall endeavour to resolve the dispute amicably. If, however, the dispute remains unresolved within thirty days of that dispute first arising, the dispute shall be referred to a sole arbitrator for determination, whose decision shall be final and binding on the person and on the SRA. The person and the SRA shall endeavour to agree to a suitable arbitrator. In the event the person and the SRA cannot agree a choice of arbitrator, then an authorised decision maker shall appoint an arbitrator to make a final and determination on the dispute.'

The SRA Glossary contains this definition –

'*authorised decision maker in relation to a decision, means a person authorised to make that decision by the SRA under a schedule of delegation.'*

The SRA, as a corporate entity, can only ever make decisions through an authorised individual. It follows that pursuant to clause 13.1 of the new draft rules, if the SRA and the person concerned cannot agree, the SRA will make the decision anyway. This goes against natural justice. In the current version of the Rules the choice of arbitrator in the event of a dispute between the indemnified person and SIF is made by a third party. There is no reason why, and it would be fairer for the new rules to provide that, the arbitrator shall be appointed by a third party, whether the Law Society or otherwise.

(iii) Clause 16 of the new draft rules deals with maintenance and termination of the fund and provides in essence that the fund shall be continued and administered by the SRA for as long as the SRA considers necessary. In the current rules the continuation and maintenance of the fund is a decision for the Law Society not for SIF. If the new Rules are approved as drafted there would no third-party check on any decision taken by the SRA's to terminate the fund. Here again we consider that as with the existing arrangement this decision should be remain within the remit of the Law Society.

Q2: Do you have any views on our revised draft regulatory and equality impact assessments?

See comments in response to Q1 above about the notification process.

BIRMINGHAM LAW SOCIETY
one profession · one region · one voice

Leeds Law Society

BRISTOL LAW SOCIETY

Liverpool Law Society

Manchester Law Society
Instituted 1838 Incorporated 1871

Private and Confidential
By email only – paul.philip@sra.org.uk

Contact: becky@birminghamlawsociety.co.uk

Mr Paul Philip
Chief Executive
Solicitors Regulation Authority
The Cube
199 Wharfside Street
Birmingham
B1 1RN

Date: 2 December 2022

Dear Sir

Consumer protection for post six-year negligence
Solicitors Indemnity Fund Ltd (SIF)

1. This letter is written on behalf of the Law Societies of Birmingham, Bristol, Leeds, Liverpool and Manchester, known collectively as the Joint V.
2. We request that the SRA reverses the decision made at its Board meeting on 13 September 2022 to transfer the arrangements for Post Six Year Run Off Cover (PSYROC) from SIF to the SRA.
3. We are deeply concerned that the SRA has failed to consult on the options that it considered at its Board meeting and that, as a result, has made a hasty decision that could be regretted both by consumers and the profession alike.
4. We propose instead that further, more detailed information and costings should be obtained on both (a) the proposed arrangement for transfer from SIF to the SRA, and (b) the alternative proposal of a reconfigured SIF to operate at a lower expense level, so that a full consultation can take place with the profession and other stakeholders before the Board makes a decision.

5. Our reasons are set out below.

Summary

6. The decision was predicated on anticipated savings of £300,000-£400,000 apparently referred to in an unpublished analysis by Willis Towers Watson (WTW), which we assume is broadly reflected in the subsequent WTW report dated October 2022 (the October WTW Report).
7. We believe that the basis of the decision is flawed for the reasons identified in paragraph 9, and that this may result in significant additional and avoidable costs being passed on to the profession.
8. The current SIF arrangements have been in place for 22 years; new arrangements should be made in the expectation that they may be sustainable for a substantial period of time.
9. The flaws we identify, which are explained further below, are –
    a) The anticipated saving is calculated by reference to the costs of the Assigned Risks Pool (ARP), which do not form a realistic comparable;
    b) The SRA is unlikely to have the required expertise in professional liability claims, which bear no comparison with Compensation Fund claims, lack of which contributed to the collapse of numerous insurers;
    c) Consideration of the handling of residual liabilities within SIF, including pre 2000 firm closures and existing notified claims, was excluded from the October WTW Report and there is no indication of the potential scale of these;
    d) The October WTW Report, replete as it is with warnings that it is based on limited data in a compressed timeframe, cannot provide the evidential basis for a decision which may have substantial financial consequences for the profession;
    e) Either no or inadequate consideration appears to have been given to investigating the alternative of achieving costs savings within SIF;
    f) The transfer from SIF to the SRA was raised in neither the November 2021 consultation nor the Discussion paper dated 3 August 2022.
10. The decision is not therefore compliant with section 28 of the Legal Services Act 2007 which requires that the SRA acts in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

Explanation of reasons

The anticipated saving is calculated by reference to the costs of the ARP, which do not form a realistic comparable

11. The ARP provided cover for firms unable to obtain insurance in the open market. Comparison of SIF's costs with the ARP is flawed, because the cost of defending ARP claims as a proportion of the whole would have been closer to those of open market insurers; SIF's costs will be disproportionately higher as a high proportion of claims are statute barred (meaning there will be no claims payment), or pursued by litigants in person where much of the costs burden falls on those defending claims.

12. A simple comparison of the proportion of defence costs to claims payments between the ARP and SIF is therefore fundamentally flawed. Higher defence costs are to be expected and are justified.

13. It is always possible, if undesirable, to adjust the balance by paying claims for which there is a good defence available rather than defending them. As the WTW report dated 19 November 2021, published with the November 2021 consultation, noted, '…costs must be viewed in the context of value-add as there can be false economies if processes become inferior in quality because of cost-cutting which can lead to increases in claim costs for example'.

The SRA is unlikely to have the required expertise in professional liability claims, which bear no comparison with Compensation Fund claims, lack of which contributed to the collapse of numerous insurers;

14. The costs savings are predicated on claims being handled by the SRA's Client Protection Team. This Team's expertise is in the administration of a rules-based Compensation Fund.

15. The claims against SIF often involve complex issues of law, particularly in relation to limitation periods and trusts, and we understand that many are made by litigants in person which may require extensive investigation by SIF.

16. Professional liability claims handling involves a very different skillset acquired through years of experience which will require recruitment and ongoing cost, yet the Willis report on which the SRA's proposals are predicated envisages the SRA utilising or reallocating existing resources.

17. After the global financial crisis, a large number of insurers entered the market without experience of solicitors' professional indemnity risks, including Alpha, Balva, Elite, Enterprise, ERIC, Lemma and Quinn among others, all of which became insolvent, the SRA should be cautious about assuming similar risks.

18. We strongly encourage the SRA to reconsider its position, to seek further analysis and to consult fully in order to ensure that a fully informed decision is made.

Yours sincerely

Tony McDaid
President – Birmingham Law Society
On behalf of the Joint V Law Societies – Birmingham, Manchester, Liverpool, Leeds & Bristol

RESPONSE TO SRA CONSULTATION of 6th October 2022

Consumer protection for post six-year negligence

To: **the SRA team** postsixyear@sra.org.uk

From: **Janis Purdy**

Solicitor, SRA No 115220 janis.purdy@gmail.com

Question 1

Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

A milestone has been reached. I am very glad the SRA now agree that PSYROC in the form of an indemnity scheme should be maintained. Moreover, and of crucial importance, the in house scheme which the SRA has decided upon will have exactly the same scope and cover as currently provided by the SIF.

In view of the welcome decision of the SRA Board in September 2022, and the contents of this latest consultation, I withdraw my previous objections to the closure of the SIF and give my support to the proposed replacement scheme managed in house by the SRA.

Obviously, and as touched upon in various places in the consultation paper, it will now be essential to resolve the technical detail required to make the scheme fully and properly functioning in the way it is intended. In particular, but not exclusively, the tasks seem to me to be:

- finalising any necessary amendments to the draft rules
- establishing the new scheme
- making seamless transition arrangements
- the winding up of SIF Ltd
- establishing a system of transparency
- ensuring reporting responsibilities and accountability to stakeholders and to the profession
- accurate and comprehensive claims data keeping in order to have an overview of, and improve management of, long-tail risks.
- managing set-up and operating costs
- ensuring that the pot of money being transferred from the SIF is ring-fenced for claims and claims handling

I hope and anticipate that the SRA will liaise with The Law Society in resolving these technical issues.

Finally there is the matter of a levy on the profession in order to top up the indemnity fund as necessary and build up reserves. The consultation makes clear that the SRA will be consulting separately on the issue of a levy.

In advance of that consultation, I wish to suggest now that a levy should start immediately upon implementation of the scheme, or with the first collection of PC fees after that. Even if the levy is very small, it will be important for the profession to get used to this. And small contributions each year to build up the fund are far better than a much larger emergency levy at a later date. I am sure the SRA are mindful of this.

I hold to my view previously expressed that the levy should be a flat firm fee, not one imposed on individual solicitors. That would hit the big firms disproportionately. A flat firm levy would be fair and equitable, since it is the small firms who are more likely to gain the benefit for their clients.

Question 2

Do you have any views on our revised draft regulatory and equality impact assessments?

I take no issue with the impact assessment. I just have an observation of a positive nature as follows:

When the SRA have put their proposed in house scheme into place as at 1st October 2023, the profession will be able to go forward with confidence, knowing that our clients will be protected against long-tail claims on a full indemnity basis.

New small firms and sole practitioners can set up. Others can safely close their firms in a timely fashion as and when they need to. They will be able to rely on continuing PSYROC as provided by the SRA.

The legal landscape need not undergo the dramatic change which had been predicted and feared, where the high street and convenient access to legal advice disappear. Consumer choice and easy access to legal services can be maintained. This will be of huge benefit to the profession and to consumers alike.

14 December 2022

Janis Purdy
Solicitor, SRA No 115220

NOTE: I consent to the publication of my response above and request that it be published.

SRA Consultation:
Consumer protection for post six-year negligence

Law Society Response
15 December 2022

SRA consultation on consumer protection for post six-year negligence – Law Society response

1. The Law Society is responding to this consultation[1] in its representative capacity as the independent professional body for solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

2. The purpose of this consultation is to resolve the issue of post six year run-off cover (PSYROC), which ensures that there will be protections in place for consumers of legal services or their beneficiaries in the event that claims arise more than six years after a firm has closed without a successor practice.

3. The Solicitors Regulation Authority (SRA) has consulted previously on this issue. In a consultation which closed in February 2022[2], the SRA consulted on a range of options with a preference for closing the Solicitors Indemnity Fund (SIF) and ending the provision of PSYROC as a regulatory arrangement.

4. The Law Society's response to that consultation[3] argued that while there were relatively few PSYROC claims, the impact on individuals who were unable to recover any losses would be significant, and that consumer interest demanded that such protections should be maintained. The SRA received more than 300 responses to the consultation, the overwhelming majority of which opposed the closure of SIF.

5. The SRA considered these responses and undertook further research to find an alternative solution that would not leave consumers unprotected. In August 2022, a discussion paper, sought views on these other options[4].

6. In its response to the discussion paper[5], the Law Society set out three criteria that any new PSYROC scheme would have to satisfy before we could accept it as an alternative to SIF. These were that any such scheme must:

    - provide indemnity as permitted by section 37 of the Solicitors Act 1974 and be an indemnification arrangement as defined in section 21(2) of the Legal Services Act 2007;
    - be ringfenced for the specific purpose of giving indemnity protection and dealing effectively with PSYROC claims against former principals or employees of ceased SRA-regulated entities; and
    - provide the same access to, and scope of, indemnity as SIF.

[1] https://www.sra.org.uk/contentassets/183ab26cbb9749e9a2c2e670d140e3b6/consumer-protection-for-post-six-year-negligence-consultation.pdf?version=4a8173
[2] https://www.sra.org.uk/globalassets/documents/sra/consultations/sif---consultation.pdf?version=4ad40a
[3] https://prdsitecore93.azureedge.net/-/media/files/campaigns/consultation-responses/sra-future-of-psyroc-and-sif-response-february-2022.pdf?rev=d3e6be4fff9448308b110505649ed7b4&hash=B82753FC0F492B6D9B0B13922B2D1332
[4] https://www.sra.org.uk/sra/consultations/discussion-papers/solicitors-indemnity-fund-sif-consumer-protection-negligence-claims/
[5] https://prdsitecore93.azureedge.net/-/media/files/campaigns/consultation-responses/sra-discussion-paper-sif-psyroc-response-august-2022.pdf?rev=9ff61afb1d79449a888a872502666a70&hash=EA112CAD600ECB015003839ABC367B1F

7. We believe that the proposals for a new PSYROC scheme set out in the SRA's latest consultation document could meet these requirements, and subject to the points laid out in our response below being fully addressed, we are supportive of the SRA's proposed approach, so far as it has been articulated.

8. Since publication of this consultation by the SRA, the Society has engaged in discussion with the SRA with a view to resolving issues and concerns arising from the proposed arrangements and draft rules for an SRA-controlled scheme. Where agreement has been reached it is referenced in the Society's comments below. The Society is grateful for the SRA's open and collaborative approach to the issues and concerns that were raised.

Question 1: Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

9. The Law Society accepts that the SRA's intention with the rule changes proposed in this consultation is to:

    - maintain consumer protection for PSYROC as an SRA regulatory arrangement providing the same level of cover as SIF; and
    - provide this protection through an indemnity scheme operating under the control of the SRA, giving them direct oversight of its operations, enabling them to realise potential cost efficiencies, and allowing them to manage and maintain the fund.

10. On that basis, the proposal is for the SRA to assume control of the existing SIF fund and to continue to use the fund for its current purpose by designating to itself (under the current SRA Indemnity Rules 2012[6]) the function of administering *the existing fund*. Any references to a "new fund" in this response should be read and understood in that context.

11. There remain elements of the proposals that we believe ought to be considered in more detail. They include the following issues:

    - *Notifications;* use of a prescribed form for notifications should be simple, and alternative means of notification should be accepted if necessary.
    - *Arbitration;* the proposal removes the power to appoint arbitrators from the President of the Law Society.
    - *Waivers;* the proposal removes the existing rule on waivers.
    - *'Decisions by the Society'*; the proposal removes the rule allowing insignificant non-compliance with the rules to be disregarded.
    - *Reporting;* the new scheme should be as transparent as possible and publish reports at least every twelve months.
    - *Management of the fund;* there are possible differences between the modelling for the scheme and how it is intended to operate in practice in relation to existing and new claims.
    - *Termination of the fund;* the draft rules no longer recognise the Law Society's reversionary interest in the ultimate disposition of any residual surplus from a future closure of the fund.
    - *Use of claims data;* claims data should be shared and used to improve the regulation and management of long-tail risks as well as risk management by the profession.

[6] https://www.sra.org.uk/solicitors/standards-regulations/indemnity-rules-2012/

- *Separation of indemnification and disciplinary functions;* the SRA must be careful to separate its indemnification and disciplinary functions regarding PSYROC claims.
- *Contributions;* the SRA should move quickly to implement an annual levy on firms to smooth contributions and avoid running down the assets of the fund whilst safeguarding against future increases. This will serve to confirm to the profession and to consumers that cover will be sustained and provide reassurance that it will be sustainable.

Notifications

12. While the current SIF rules require only for claims to be "notified" to SIF Ltd (the independent company that manages SIF), the new scheme requires that claims be "notified in the prescribed form" to the SRA. The SRA has clarified that in practice SIF Ltd currently requires that notifications are made using a prescribed form[7] or via the SRA's "Professional Indemnity Insurance Disclosure Form" if contact is made directly to the SRA, and that the intention is to formalise the current practice which has evolved under the existing scheme. They have also given assurance that the aim of the prescribed form is to ensure that notifications are properly received, and that sufficient information is obtained.

13. We accept that having a prescribed form for notifications should make claims handling more efficient and cost effective, and we would therefore be amenable to such an approach, but we are also concerned that this new requirement should not become a barrier to legitimate claims.

14. The SRA must ensure that the process is as simple as possible, and provision should be made to allow notifications by other means, in the event that the party making the notification is unable to use the prescribed form. This might involve producing a clear guide on how to complete the prescribed form (with FAQs as frequent questions emerge), a telephone helpline, and additional support for claimants with specific needs.

Arbitration

15. While we welcome changes to the rules to resolve previous ambiguity around who can seek the appointment of an arbitrator, our preference would be to retain the role of the President of the Law Society to o appoint arbitrators.

16. In the event of a dispute, there may be concerns that if the SRA, through an authorised decision maker, is responsible for the appointment of an arbitrator, the appointee may not be wholly impartial. Retaining the role of the President of the Law Society as the person who makes these appointments would provide assurance of the arbitrator's impartiality, without impinging on the internal governance rules made by the Legal Services Board (LSB).

17. Following further discussion since publication of the consultation, and subject to the approval of their Board, the SRA has helpfully indicated an intention to amend the draft rules to provide that, where an independent arbitrator is required, the SRA will invite an appropriate independent body to appoint the arbitrator. Provided the process is transparent and that arbitrators are appointed independent from the SRA, this solution should help ensure independence in the process.

[7] https://www.sifund.co.uk/https-www-sifund-co-uk-claimants-in-person-questionnaire-4/

Waivers

18. The current rules have a provision for the SRA (exercising the regulatory powers of the Law Society) to waive in writing any obligations on solicitor or firms arising under the rules. But this has been removed from the proposed new rules.

19. The SRA has explained that the reason for this removal is that going forward, any application for a waiver in relation to the rules governing the new scheme would be dealt with in accordance with the SRA's general approach to waivers[8] so there is no need for the issue of waivers to be addressed explicitly within the new rules.

20. However, based on the principle that the new scheme will provide like-for-like protection, we believe that there is merit in retaining the provision for waivers within the new rules. It is worth considering that SIF Ltd have not identified any waivers that have been granted, which further calls into question the need for this alteration to the existing rules.

21. If the SRA decides to go ahead with the removal of waivers from the rules of the new scheme, it should provide a clear explanation of how waivers will work in relation to the scheme, and ensure that they are provided on the same basis as the existing arrangements.

'Decisions by the Society'

22. The current rules also have a provision for 'decisions by the Society'. This provision grants the SRA (exercising the regulatory powers of the Law Society) the ability to treat a person who has failed to comply with the rules as having acted in compliance, where such non-compliance is regarded by the Society (in practice the SRA) as being insignificant. This provision has also been removed from the new rules.

23. The SRA has explained that any non-compliance with these rules would be dealt with in accordance with the SRA Enforcement Strategy[9] and the Regulatory and Disciplinary Procedure Rules[10], and therefore – like waivers – no longer needs to be addressed explicitly within the rules for the new scheme.

24. Again however, based on the principle that the new scheme is intended to provide the same protections that are currently offered by SIF, we believe that the provision for the SRA to disregard insignificant instances of non-compliance should be retained in the rules governing the new scheme. This supports the primary purpose of public protection.

25. With regard to both the issue of waivers and 'decisions by the Society', if the removal of the provisions is not intended to lead to different outcomes than would result under the current rules, then there is no harm in their retention. The powers would only be exercised rarely, within the specific and limited context of PSYROC claims. They would in no way undermine the SRA's general approach to waivers, enforcement, or disciplinary procedures, but their retention would provide reassurance that like-for-like protections are being maintained.

[8] https://www.sra.org.uk/solicitors/guidance/granting-waiver/
[9] https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/
[10] https://www.sra.org.uk/solicitors/standards-regulations/regulatory-disciplinary-procedure-rules/

Reporting

26. Under the current rules, SIF Ltd is required to produce reports to the Law Society Council about the management and administration of the fund, recommendations for contributions, and recommendations for the circumstances and extent to which indemnity exclusions should be applied in any future indemnity period[11]. This requirement should be retained in the new rules.

27. An ongoing requirement for the fund to produce such reports would provide the necessary assurance that it is being well-managed, and would enable the Law Society to provide informed advice in the event that issues emerge. Whilst the number of claims from SIF have historically been small, statistical analysis can provide insights into trends across the market. There is a dearth of cross-market information that represents a challenge for practitioners and, we suggest, for the regulator. Furthermore, solicitors who have been involved in relevant areas of work could help to provide useful context to better understand what is happening.

28. Since publication of the consultation, the SRA has explained that the new scheme will form part of their regulatory arrangements, and that they recognise both the Law Society's residual role as an approved regulator and their own obligation to provide the Society with assurance about how such arrangements are run. Assurance has also been given that the SRA is committed to transparency of the operations of the future scheme and that, as an absolute minimum, it will report as frequently as SIF does with the intention to provide more information.

29. The SRA's assurance obligation is currently fulfilled through the reporting mechanism set out in the Assurance Protocol[12]. The SRA has expressed a willingness to discuss any amendments to the Protocol that may be necessary to accommodate reporting on the administration of the scheme, and we welcome the opportunity to jointly develop a form of reporting that would be of ongoing practical use and provide appropriate levels of transparency and assurance.

Management of the fund

30. We understand that the consultation is not seeking views on specific arrangements to be implemented for the management and administration of the new fund. However, we believe that it is necessary to have greater clarity about this aspect at a time when there is still an opportunity for stakeholders and interested parties to comment if it were felt that the arrangements did not address all relevant matters.

31. For instance, it would be helpful to set out the SRA's proposed approach to the maintenance and use of the core capital in the fund. In their analysis, Willis Towers Watson (WTW) correctly note that SIF Ltd currently makes provision for claims that are incurred but not reported when calculating its total estimated future liabilities arising from post six-year run off claims.

32. The provisions are made based on actuarial reviews which will no longer be required once a policy for reserves has been established, and the capital has been invested. Providing for 1 in 200 year events is not necessary for a fund which can be topped up by a levy (see *Contributions* below). The SRA policy on how it intends to address this is key to confidence in the new fund.

[11] https://www.sra.org.uk/solicitors/standards-regulations/indemnity-rules-2012/#rule-17

[12] https://www.sra.org.uk/sra/how-we-work/our-board/accountability-statement/law-society-sra-assurance-protocol/

33. The WTW report identifies scope for any future scheme to realise cost savings by optimising its asset and liability management. This includes the scheme's approach to reserving against claims and reinsurance. Such an approach would also involve consideration of the potential to use assets transferred from SIF to contribute to the running costs of the scheme.

34. We expect that when the SRA submits its rule change application to the LSB it will include a business plan and budget for the new scheme setting out how it will address the following issues:

    - plans for transferring assets and cases from SIF and SIF Ltd to the new scheme and the SRA;
    - the new scheme's financial arrangements, explaining the underlying policy assumptions, identify any remaining uncertainties, and setting out measures intended to mitigate any associated risks; and
    - details of any plans to levy funds from the profession for the ongoing maintenance of the new scheme.

Termination of the fund

35. The current rules provide that the Law Society Council determines whether it remains necessary or appropriate to continue to hold, manage and administer the fund for the purpose of providing indemnity in respect of claims. In reality this is a regulatory decision delegated to the SRA, but the new rules would transfer that decision-making power to the SRA directly.

36. The current rules also provide that as and when it is considered no longer necessary or appropriate that all or any part of the fund should be held, managed, and administered for indemnity purposes, the fund may be used for the purpose of providing indemnity in any other way permitted by section 37(2) of the Solicitors Act 1974.

37. If the fund is not to be used for alternative indemnification purposes, it may be used by the Law Society for the overall benefit of the profession in such manner as the Society may decide. It has already been recognised by the SRA that this final provision falls to be decided by the Law Society as representative body for the profession, and not the SRA.

38. However, the new draft rules (Rule 16) any determination of the ultimate use of any residual surplus on termination of the fund would be removed from the Law Society and be made by the SRA:

    > *As and when the SRA no longer considers it necessary or appropriate that all or any part of the fund should be so held, managed, and administered, the SRA will use the fund for the purpose of providing indemnity in any other way permitted by section 37(2) of the SA and otherwise for the overall benefit of the solicitors' profession in such manner as it may decide.*

39. The general principle underlying the proposed SRA-administered scheme is that references to the powers and functions of SIF Ltd are to be replaced with powers and functions of the SRA, and that references to 'the Society' should also be replaced with references to the SRA (in practice the powers and functions of the Society under the current rules are already exercised by the regulator). However,

this does not apply to decisions about the use of residual surplus upon termination of the fund, which should revert to the Law Society as it would under the current rules.

40. Given the origin of the fund (contributions made by Law Society members) and the underlying rationale for giving the Law Society the power and function to make decisions about use of residual surplus (that the money raised from the profession is held in a *de facto* relationship of trust), the new scheme should not disturb this arrangement.

41. Maintaining the role of the Law Society in determining the application of any residual surplus would also mean that the Law Society would retain a direct and reversionary interest in the fund, on behalf of its members.

42. Following discussions after publication of this consultation, and subject to the approval of their Board, the SRA has agree with this position and now intend to revise the proposed rule to reflect that, in the event of a closure of the new scheme in circumstances where the SRA does not identify an alternative indemnification purpose for the residual funds permitted by section 37(2) of the Solicitors Act, they would be transferred to the Law Society to determine how they could be used for the overall benefit of the profession.

Use of claims data

43. We welcome the SRA's intention to improve the collection and analysis of claims data, and hope that it will lead to the more effective regulation of long-tail risks. It would be helpful if the SRA could produce regular reports, detailing the types of claims that the fund has handled, setting out lessons learned, and making recommendations to firms about steps that they could take to reduce the risk of similar claims arising in the future.

44. Improved risk management, informed by the analysis of claims data, is one of the great potential benefits of the SRA's current proposals. It offers the real possibility of reducing the likelihood of future PSYROC claims, and with them the long-term costs of maintaining the fund. While we accept that it is the very unpredictability of PSYROC claims that makes the provision of the fund so necessary, we believe there is scope for improvement in this area and we look forward to working with the SRA to make the most of this opportunity.

Separation of indemnification and disciplinary functions

45. Concerns have been expressed that if PSYROC claims are no longer handled by a separate entity, there may be some cases where the SRA will find itself acting as both the provider of indemnification through the new scheme and as the professional disciplinary body, which could lead to conflicts of interest.

46. Under the current scheme, those seeking indemnification from the SIF can provide information to assist in their defence, and when panel solicitors are instructed, legal professional privilege applies. However, there are provisions enabling SIF to provide information and documents to the Law Society (and by extension the SRA) in relation to instances of fraud, dishonesty or inadequate professional services, and certain other specified exceptions.

47. Under the proposed new scheme, those seeking indemnity would have to provide all relevant information directly to the regulator. Some may be reticent to do this, which could inhibit full and free discussion of the defence of claims.

48. It is likely that cases involving serious disciplinary issues in relation to long-closed firms or retired solicitors would be extremely rare. Nevertheless, we understand that without a clear separation of the SRA's indemnification and disciplinary functions, there is a risk that those seeking indemnification will feel unable to discuss their cases frankly.

49. Similar circumstances may already arise in connection to the Compensation Fund, which is administered directly by the SRA, and where claims are far more likely to involve breaches of SRA disciplinary rules.

50. We have sought assurance that the SRA will exercise similar caution in how it approaches any disciplinary matters that emerge in relation to claims notified to the new fund as it does when handling applications for grants from the Compensation Fund.

51. The SRA has assured the Society that it will adopt the same approach for claims to the new scheme as it does for claims to the Compensation Fund, and that this will include:

    (i) ensuring that valid claims are not unnecessarily delayed or otherwise affected by disciplinary considerations such as investigations; and
    (ii) arranging that information arising from claims to the scheme is only passed to the SRA's investigation and supervision team if it indicates a regulatory concern.

52. This seems a fair and reasonable approach, and we would welcome a more detailed statement from the SRA explaining how this aspect of the scheme is intended to operate in practice.

Contributions

53. Although the consultation does not seek views on financial contributions from the profession to maintain the fund, it does recognise that this is an important issue that will need to be resolved:

    > *The question of how to balance the use of residual assets, investment income and new levy funding will be a key operational issue for the future scheme. We would consult on the structure and mechanics of any levy for post six-year consumer protection before collecting a levy for the first time.*

    We believe that setting the reserves and investment policy is a key issue for the scheme and await the SRA's further consideration of this aspect.

54. The Law Society's preference would be for a levy to be imposed from the outset, as doing this would maintain the funds transferred from SIF rather than running them down.

55. The basis for levying the profession needs to be established, and we would expect the capital in the fund to be preserved close to its current level, while operational costs and claims would be paid from annual investment income or gains. It would be of concern to the Society if the SRA did not adopt this approach. Maintaining a large

fund would provide a buffer in the event of large or high-volume claims, and avoid the wide fluctuations that the profession has experienced in relation to Compensation Fund contributions over the years.

56. In our response to the SRA's previous consultation on the future of SIF, we called for the retention of a PSYROC scheme and made the following assertion about our members' willingness to fund such an arrangement, based on a cost estimate in an earlier WTW report:

> *Our engagement with the wider profession suggests that it considers that a levy of £240 per firm is a proportionate cost to advance the regulatory objectives.*

57. Given that the profession has already expressed its willingness to contribute to the maintenance of a PSYROC scheme on a per firm basis, we do not think it is necessary to carry out a further consultation on this matter. Indeed, with annual contributions to the proposed new scheme likely to be considerably less than the £240 per firm previously suggested by WTW, the most prudent and practical option would be for the SRA to implement a levy immediately, along with the introduction of the new scheme.

58. Transparency around this issue is important, because confidence in the fund will affect members' decision regarding the future development of their careers and firms. By raising a levy from the outset, the SRA can signal its stated intention to maintain the fund for the longer term.

59. The process for collecting a levy is already available through the practising certificate fee, but the governance mechanisms for activating this can be slow. The time for consultation and decision should be now, in order to avoid complications and delays down the line.

Outstanding issues

60. Given the short period of time before introduction of the new scheme we have engaged with the SRA to establish progress on a number of important matters, where – understandably – they are not yet in a position to provide a detailed response. In these circumstances, a statement indicating future intentions would be helpful as a signal to the market, and to maintain the confidence of the profession.

61. We will wait until we have seen the SRA's rule change application to the LSB before commenting further, but as we have indicated previously, we expect that it will include:

    - plans for transferring assets and open claims from SIF and SIF Ltd to the new scheme and the SRA;
    - the proposed financial arrangements including underlying policy assumptions and a financial reserving policy, as well as details of any remaining uncertainties, and measures intended to mitigate the associated risks; and
    - the financial analysis that underlies any decision not to levy funds from the profession for the ongoing maintenance of the new scheme from its commencement.

Question 2: Do you have any views on our revised draft regulatory and equality impact assessments?

62. No. We are satisfied that to the extent that the new arrangements will replicate the protections provided by SIF, it will benefit solicitors and the consumers that make use of their services.

Solicitors Regulation Authority
The Cube
199 Wharfside Street
Birmingham
B1 1RN

By email only: postsixyear@sra.org.uk

13 December 2022

Dear Sirs

Post six year run off cover: further consultation

APIL welcomes the opportunity to respond to the SRA's plans following the closure of the Solicitors' Indemnity Fund (SIF) in September 2023. We are pleased to note that the SRA controlled indemnity fund will provide cover for negligence claims brought six or more years after a firm has closed, at the same level of cover as is currently provided by the SIF. We welcome that the SRA has listened to concerns about the removal of the SIF, and the need for people who bring claims six years after a firm has closed, to have access to funds to cover their claim. As we pointed out in our response to, and in meetings with, the SRA earlier this year, the number of claims that fall into this category may be small, but due to the nature of claims that are likely to be brought after six years, they will relate to for example long tail diseases, and have the potential to be of very high value.

As we have stated previously, those who are injured through another's negligence should receive full compensation which puts them as close as possible to the position they were in prior to the negligent incident. Removal of the SIF, with no alternative provision in place, would have meant that those who wish, and are permitted to, bring a professional negligence claim against a firm which closed more than six years ago, would be unlikely to be able to do so. The claimant would then be left uncompensated or undercompensated for their losses as a result of the professional negligence. We therefore welcome the SRA's approach.

On reviewing the detail of the proposed rule changes, we note that where the current rules state simply that the claim must be notified to the SIF, the new rules require notification via a "prescribed form". We are concerned that this may indicate a lack of flexibility in the new scheme. There is no reason that this scheme should have stricter/more rigid requirements than the existing scheme. It would be highly unfair if members of the public were denied compensation because the scheme refused to provide an indemnity due to a technicality.

We hope that our comments prove useful to you.

Yours faithfully

Alice Taylor

Registered Office:
C/o Milsted Langdon LLP
Freshford House, Redcliffe
Way, Bristol, BS1 6NL
T: 0117 945 8486
E: info@bristollawsociety.com
W: www.bristollawsociety.com

Consultations Team
Solicitors Regulation Authority
The Cube
199 Wharfside Street
BIRMINGHAM
B1 1RN

21 December 2022

By Email Only: postsixyear@sra.org.uk

Dear Consultations Team

POST SIX YEAR RUN OFF COVER ("PSYROC")

Bristol Law Society welcomes the SRA decision to continue with PSYROC.

Despite the cogent and compelling arguments in the Joint V Law Societies letter of 2 December 2022, the SRA, at least at this stage, seem unprepared to substantively answer the points made. We remain concerned as to the board decision taken regarding SIF Limited, the transparency of the decision-making process and (lack of) relevant expertise to properly and efficiently run the scheme as opposed to a reconfigured SIF Limited.

We make two specific points:

- All and any of the funds transferred must be solely and exclusively utilised for the purpose collected; and
- Full consideration ought to be given to the transfer of existing SIF Ltd staff so as to reduce any potential redundancy cost and boost the expertise within the SRA.

If the SRA is not prepared to reverse it's decision regarding SIF Ltd we share the reservations and concerns as set out in The Law Society formal response to the consultation.

Yours faithfully

Erin Sawyer
Co-President

Edward Thompson
Co-President

BIRMINGHAM LAW SOCIETY

one profession • one region • one voice

Response to SRA Consultation on Consumer Protection for post six-year negligence

December 2022

Response of the Consultation Committee of the Birmingham Law Society to the SRA Consultation on Consumer Protection for post six-year negligence

This response has been prepared by the Consultation Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Consultation Committee whose members are specialist lawyers practising in all aspects of professional regulation and discipline.

Response

We welcome the SRA's acceptance that the appropriate solution for consumer protection is an indemnity fund as opposed to a discretionary compensation fund. The SRA had proposed as recently as 3 August 2022[1] that a discretionary compensation fund could be feasible but we are pleased that this idea has been abandoned.

The SRA has therefore come full circle from its original proposal to abolish SIF and not provide any post six year run off cover to a discretionary compensation fund (3 August 2022) and now to an indemnity fund (October 2022). The existing Solicitors Indemnity Fund is of course an indemnity fund so why not retain it?

Between the SRA discussion paper on 3 August 2022 and this current SRA consultation published on 6 October 2022, the SRA has obtained a report from WTW (Willis Towers Watson) seeking to justify the replacement of SIF with an SRA in-house indemnity fund. The WTW report appears to have been sent to the SRA by letter dated 6 October 2022 [page 2 Annex 2 to SRA Consultation] on the same day that the current consultation was published.

[1] SRA Discussion Paper – Next steps on SIF and consumer protection for negligence claims

We are seriously concerned that the question of whether SIF should be retained or whether it should be replaced by an SRA in-house indemnity fund has not been subject to any consultation. The SRA made the decision to go in-house at its Board meeting on 13 September 2022 but it had not consulted on the two options.

As SIF has been paid for by contributions from the profession, the very least that the SRA should have done was to consult on the merits or otherwise of these two remaining options. Instead, the SRA forged ahead and made the decision on 13 September.

The Minutes dated 13 September record that the SRA Board at 10.5 (iii) *"agreed that we establish an indemnity scheme operating under the direct control of the SRA to deliver post six-year consumer protection"*

At 10.6 of the Minutes, it is stated that "*Following the Board's decision we will consult for 12 weeks on our* ***approach*** *and the draft rules for a new indemnity scheme…." (Emphasis applied).*

The Minutes suggest that the SRA will consult on its approach but are at odds with the fact that a decision had already been made without consultation.

Birmingham Law Society has joined with the other four main law societies known as the Joint V and made representations by letter dated 2 December 2022. For ease of reference, the text of that letter is set out below in italics.

Consumer protection for post six-year negligence
Solicitors Indemnity Fund Ltd (SIF)

1. *This letter is written on behalf of the Law Societies of Birmingham, Bristol, Leeds, Liverpool and Manchester, known collectively as the Joint V.*
2. *We request that the SRA reverses the decision made at its Board meeting on 13 September 2022 to transfer the arrangements for Post Six Year Run Off Cover (PSYROC) from SIF to the SRA.*
3. *We are deeply concerned that the SRA has failed to consult on the options that it considered at its Board meeting and that, as a result, has made a hasty decision that could be regretted both by consumers and the profession alike.*
4. *We propose instead that further, more detailed information and costings should be obtained on both (a) the proposed arrangement for transfer from SIF to the SRA, and (b) the alternative proposal of a reconfigured SIF to operate at*

a lower expense level, so that a full consultation can take place with the profession and other stakeholders before the Board makes a decision.

5. *Our reasons are set out below.*

Summary

1. *The decision was predicated on anticipated savings of £300,000-£400,000 apparently referred to in an unpublished analysis by Willis Towers Watson (WTW), which we assume is broadly reflected in the subsequent WTW report dated October 2022 (the October WTW Report).*
2. *We believe that the basis of the decision is flawed for the reasons identified in paragraph 9, and that this may result in significant additional and avoidable costs being passed on to the profession.*
3. *The current SIF arrangements have been in place for 22 years; new arrangements should be made in the expectation that they may be sustainable for a substantial period of time.*
4. *The flaws we identify, which are explained further below, are –*
    a. *The anticipated saving is calculated by reference to the costs of the Assigned Risks Pool (ARP), which do not form a realistic comparable;*
    b. *The SRA is unlikely to have the required expertise in professional liability claims, which bear no comparison with Compensation Fund claims, lack of which contributed to the collapse of numerous insurers;*
    c. *Consideration of the handling of residual liabilities within SIF, including pre 2000 firm closures and existing notified claims, was excluded from the October WTW Report and there is no indication of the potential scale of these;*
    d. *The October WTW Report, replete as it is with warnings that it is based on limited data in a compressed timeframe, cannot provide the evidential basis for a decision which may have substantial financial consequences for the profession;*
    e. *Either no or inadequate consideration appears to have been given to investigating the alternative of achieving costs savings within SIF;*
    f. *The transfer from SIF to the SRA was raised in neither the November 2021 consultation nor the Discussion paper dated 3 August 2022.*
5. *The decision is not therefore compliant with section 28 of the Legal Services Act 2007 which requires that the SRA acts in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.*

Explanation of reasons

The anticipated saving is calculated by reference to the costs of the ARP, which do not form a realistic comparable

6. *The ARP provided cover for firms unable to obtain insurance in the open market. Comparison of SIF's costs with the ARP is flawed, because the cost of defending ARP claims as a proportion of the whole would have been closer to those of open market insurers; SIF's costs will be disproportionately higher as a high proportion of claims are statute barred (meaning there will be no claims payment), or pursued by litigants in person where much of the costs burden falls on those defending claims.*
7. *A simple comparison of the proportion of defence costs to claims payments between the ARP and SIF is therefore fundamentally flawed. Higher defence costs are to be expected and are justified.*
8. *It is always possible, if undesirable, to adjust the balance by paying claims for which there is a good defence available rather than defending them. As the WTW report dated 19 November 2021, published with the November 2021 consultation, noted, '…costs must be viewed in the context of value-add as there can be false economies if processes become inferior in quality because of cost-cutting which can lead to increases in claim costs for example'.*

The SRA is unlikely to have the required expertise in professional liability claims, which bear no comparison with Compensation Fund claims, lack of which contributed to the collapse of numerous insurers;

9. *The costs savings are predicated on claims being handled by the SRA's Client Protection Team. This Team's expertise is in the administration of a rules-based Compensation Fund.*
10. *The claims against SIF often involve complex issues of law, particularly in relation to limitation periods and trusts, and we understand that many are made by litigants in person which may require extensive investigation by SIF.*
11. *Professional liability claims handling involves a very different skillset acquired through years of experience which will require recruitment and ongoing cost, yet the Willis report on which the SRA's proposals are predicated envisages the SRA utilising or reallocating existing resources.*
12. *After the global financial crisis, a large number of insurers entered the market without experience of solicitors' professional indemnity risks, including Alpha, Balva, Elite, Enterprise, ERIC, Lemma and Quinn among others, all of which became insolvent, the SRA should be cautious about assuming similar risks.*

13. *We strongly encourage the SRA to reconsider its position, to seek further analysis and to consult fully in order to ensure that a fully informed decision is made.*

We can see that there are only two questions raised in this current consultation and that these focus upon draft rules for implementing the transfer and upon an equality impact assessment. The profession and those entitled to be consulted have been ignored. A step in the consultation process has been omitted.

As per the letter above, we call upon the SRA to undertake a full consultation on whether the indemnity fund should be brought in-house or whether SIF should continue.

Question 1:

Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six-year indemnity scheme?

The title of the consultation (Consumer protection for Post six-year negligence) is incomplete and ambiguous. The consumer protection required is not solely concerned with the tort of negligence. It is also about breach of contractual duty made more than 6 years after the alleged breach of duty, but also made more than 6 years after the insured law firm has ceased to exist and had no successor firm, and also where it is outside the 6-year run off cover provided by the last PI insurer of that firm. The previously used, but seemingly now abandoned, known description of PSYROC, Post Six Year Run Off Cover, was a much more accurate description of the arrangement.

We note that this consultation states that the SRA has already decided upon a new indemnity scheme managed by the SRA as opposed to a reconfigured SIFL. It appears that the new scheme will be managed by SRA staff. We repeat our concern made in response to previous consultations on this topic – that the SRA has no experience of managing an indemnity scheme. This observation applies to the current

SRA employees and to the members of the SRA Board. The SRA will therefore need to factor in the cost of recruiting experienced staff both to service this work and to oversee its operation at a Board level. The SRA will need expert solicitors to advise on these historic claims which will involve tricky issues of limitation and causation. This will come at a cost.

WTW (page 20) appears to hint that the SIFL panel of expert lawyers would not be needed by the SRA, as the SRA would contract a claims handling business instead. Presumably, so as to reassure the profession, those claims handlers would have at least as much relevant experience and skill as the current panel of lawyers. The level of expertise required for these claims cannot be underestimated.

It is important that the professional liability team handling and resolving claims against lawyers does so separately and distinct from those matters dealt with by the Compensation Fund.

As the replacement to the SIFL, the SRA will need to work more closely with insurers, brokers and underwriters to reassure the profession that only in circumstances of a fair claim will a fair settlement be made, but that otherwise they will be resilient in order to protect the profession.

The SRA states that it will take over the existing SIFL rather than establish a new scheme (and presumably will create a firewall between the SRA people and systems dealing with Compensation Fund matters and the SRA dealing with Indemnity matters). As such would the SRA employ a wholly separate SIF style team ? Is that costed and factored in by WTW? Will the SRA therefore need to change its relationship with open market insurers, brokers and underwriters?

Question 2:

Do you have any views on our revised draft regulatory and equality impact assessments?

Our only comment at this stage is that the SRA has already decided upon a new scheme but has not yet provided proposals on the structure, mechanics, and amount of any levy. Without this information, it is difficult to provide any meaningful observations upon the draft regulatory and equality impact assessments. We assume that there will be a more detailed consultation by the SRA, mindful that the SRA has assured the profession that the new scheme should cost less and certainly no more than the SIFL. We also question whether that in making this statement the SRA has taken into account the whole cost including any winding up of SIFL, redundancies and any settlements. A future consultation needs to provide more detailed figures to assess the regulatory and equality impact.

Birmingham Law Society Consultation Committee

13 December 2022

The following responses were submitted by respondents who asked us to publish their responses but not their names.

Consumer protection for post six-year negligence consultation

Response ID:7 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The arrangements should ensure that the scheme is operated by the Law Society without the engagement of the SRA or any third party.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

The engagement of the SRA in the scheme unnecessarily adds to the scope of activity of the SRA. Management of the indemnity scheme should not form part of the activity of the SRA.

Consumer protection for post six-year negligence consultation

Response ID:15 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

Provided it is a like for like replacement for a successful 20year pus scheme with no future levy without justification, and palatable to the reinsurance market and The Treasuryi I'm satisfied.
I do have concerns however regarding potential conflicts of interest with the recent increase in Fines process and costs.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

No

Consumer protection for post six-year negligence consultation

Response ID:21 Data

3. Consultation questions

10.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I am a retired solicitor whose practice closed prior to 31st August 2000 without a successor practice. This meant that under the SIF rules I would have cover indefinitely irrespective of whether the SIF continued. This may now be academic under the proposed new rules of the SRA scheme. but I would expect, and it would be fair to solicitors whose practices closed before the above date without a successor practice, to have the same terms and conditions of cover under the SRA scheme as they had under the SIF scheme

11.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

Consumer protection for post six-year negligence consultation

Response ID:30 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

They seems right and fair

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

No

Consumer protection for post six-year negligence consultation

Response ID:40 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

Only to stress that the rules and arrangements should as closely as possible replicate those which applied under the SIF scheme.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

No

Consumer protection for post six-year negligence consultation

Response ID:45 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I retired as a solicitor in 2016 after my conveyancing partner died of cancer. I bought 6 year run off cover in reliance the SIF would meet any claims after that. I was a small practice with a very good claims record but had to find £54,000 to buy the cover. I had to find a firm to take over the files. No firm would agree to being a successor practice for PI purposes. Since the death of the partner, a number of negligence cases have arisen. It seems the partner did not disclose he had been diagnosed with prostate cancer. It clearly severely affected him mentally and he clearly started to make mistakes. A number of claims have been met in the 6 year run off period. It will be impossible for me to purchase and further cover if the SIF withdraw their cover. Therefore if any further claims arise after such event until 2031 I will be personally liable. The consequences would be that i would be made bankrupt and lose my house. My marriage 42 years would end. My dear Wife's life would be ruined. I could not allow that to happen to her and after very careful consideration, i have concluded that I would have no alternative but to take my own life to avoid me having to undergo losing her house. I cannot begin to tell you how depressed i now am over this issue.
I find it devastatingly unfair that through no fault of my own i am facing these consequences. If i had known that SIF cover would be at risk i would have paid a premium to a successor practice to ensure i was always covered by PI cover. The way SIF should have handled the possible withdrawal of cover, would have been to state that as from a certain date, cover would be withdrawn so that anyone retiring could have taken informed decisions rather than imposing a retrospective liability.

I implore you not to withdraw cover. It really is a case of blood on hands.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

Consumer protection for post six-year negligence consultation

Response ID:48 Data

3. Consultation questions

10.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The arrangements should be left as they are, and the Fund maintained for new claims. It is inevitable that despite the laudable intent of saving cost, all that will result is increased cost, and absorption of regulatory time on an area where the Regulator has no expertise or standing.

11.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

There is no broad public support for the change, and the cost and uncertainty caused by change is likely to outweigh any advantage. It is likely that no benefit will enure to the regulated members and usually such benefits are weakened by such changes, and public protection will remain the same.

Consumer protection for post six-year negligence consultation

Response ID:49 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

I view it as a very positive step that there is to be a new solicitors indemnity scheme/consumer protection scheme operated by the SRA and support what is proposed.

The elements I would like to see incorporated and included are:

1. That the scheme will be permanent. There should be no power for the SRA to unilaterally close it down without the consent of the Law Society, the Legal Services Board and a majority of regulated firms. In particular there should be no 'sunset' clause or similar;

2. That it will never be merged with or become part of the compensation fund/scheme and that the two will remain entirely separate. After all, they fulfill entirely separate functions;

3. There should be no limitation on the type of client who can bring a claim;

4. That the scheme will provide the same protections for consumers and solicitors as has been provided by SIF;

5. That the above be enshrined in the necessary rule changes.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

Generally, see 1 above.
I agree with the Equality Impact Assessment

Consumer protection for post six-year negligence consultation

Response ID:64 Data

3. Consultation questions

11.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The scheme is said to protect the interests of "consumers", but I have seen no definition of "consumer".
The consultation paper also refers to whether claims from "large corporate claimants" should be covered, but I could see no explanation whether this would be the case, nor how a "large corporate" would be defined.
The position is hugely important for those solicitors who have closed a practice with no successor. After 6 years of run off, they will no longer be covered by any insurance. As the paper makers clear: "there is no prospect of a market solution to manage these risks in the foreseeable future".
If all or any corporate claimants are to be excluded, the changes to the scheme do not only impact on those corporate claimants (which, depending on definition, might include small corporates such as those which are simply operating vehicles for small traders), but also have a disproportionate impact on solicitors who have closed their practice without a successor and are now faced with the impossibility of insurance cover (post 6 year run-off) where the claimant is a corporate. For them, the goalposts have moved significantly and there is no action they can take to protect themselves or their former corporate clients. Further details are set out in my response to question 2.

12.

2) Do you have any views on our revised draft regulatory and equality impact assessments?

The consultation paper focusses purely on "consumer" protection.

It is not clear what this encompasses and whether claims by corporates will be covered. However, if some or all corporate claimants are excluded from the scheme, this has a disproportionate and substantial impact on persons with protected characteristics, namely older solicitors. This contrasts with the paper's conclusion that there are no significant impacts.

There is an unfair impact on older practitioners who have closed practices (with no successor practice) and who would otherwise be protected.

I use myself as an example.

After 15 years working for larger practices, I set up a sole practice in 2006. In doing so, as part of appropriate business planning, and as is required by the SRA, full consideration was taken of the risks and costs going forward (including ultimately closing the practice). Factored in was the cost of 6 year run-off cover when the practice eventually closed, and also the fact that SIF would cover any claims beyond that 6 year period.

Having closed my practice in 2019 and having paid run-off cover, I find that post 6 year cover is being withdrawn.

Although I have a clear claims record in 30 years of practice, I am still left in an invidious position if SIF post 6 year cover is withdrawn. I then have potential personal liability for a claim that comes out of the woodwork after this period. All my clients were businesses, some very large but some no more than corporate vehicles for sole traders. Therefore, these clients would not necessarily be protected by a scheme set up for "consumers". Although the risk is assessed as low because I am not aware of any likely claims and 6 years will have passed, the consequences in retirement could be dramatic including loss of my home. Therefore, the only sensible decision would be to take out personal insurance cover. This was not a financial consequence that was taken into account when I set up my practice. Further, so far as I am aware, there are no suitable insurance policies available on the market, and the consultation paper states "there is no prospect of a market solution to manage these risks in the foreseeable future". Even if market insurance solutions are introduced in the future, given the restricted state of the insurance market and the novel unusual type of policy, the cost of insurance would likely be prohibitive. I am left with the choice

of sleepless nights being uninsured and potentially losing my retirement savings and home, or a large premium (if a policy can be found) which (as my business has closed) is no longer tax deductible.

The goalposts have moved substantially for all such older practitioners, particularly if their practice has closed so there is no opportunity to take the new rules into account in business decisions. The original rules not only protected consumers, but also put in place an operational and risk environment which afforded protection to practitioners and set out the basis on which financial and risk decisions were taken.

Claims often occur out of entirely inadvertent, rather than deliberate, actions (or inactions) of practitioners and can arise unexpectedly. Therefore, even with a clean claims record, I suspect most practitioners in my position will feel heavy pressure to take out post 6 year insurance, a cost never anticipated in light of the arrangements that existed when they set up practice. This assumes that such insurance is even available and affordable, which the consultation paper appears to have accepted will not be the case.

In summary, unless the new scheme covers all claimants (not just "consumers"), there is a substantial, unfair impact on older solicitors who have no realistic possibility of insurance cover after 6 years from closing their practice. One solution would be to adjust the rules so that any practices closing prior to September 2023 would be covered for any corporate claims as well as claims from consumers. Practices closing after that date would at least be closing with a clear picture of the rules that would apply in future, would get tax relief on any provision they were able to place prior to closing, and would be in a position to evaluate the benefit of finding a successor practice.

Response ID:71 Data

3. Consultation questions

10.

1) Do you have any comments on the draft rules and arrangements for implementing the SRA-controlled post six year indemnity scheme?

The WTW Report makes significant qualifications and is necessarily rushed given your instructions to it, thereby materially undermining the conclusions and credibility about the cost outcomes for the options assessed. It also fails to give proper weight in any transfer to the SRA to other important areas of consideration such as infrastructure costs, the lack of competency cost, the value of established independent decision making and accountability within SIFL and the benefits of their narrow remit (focused and prioritised) and more and not just the disadvantages: see Assumptions and Basis and Limitations of Review.

SIFL's sustained and dependable infrastructure (already established), the claims and investment return expertise built up over years, the single minded pursuit of what you would regard as a narrow brief and the management structure has embedded within significant cost savings which could to a lesser or greater degree be materially affected. I expect these cost factors for instance to be affected by as yet unknown factors of any transfer (non-claim costs relating to a new scheme which WTW specifically draws attention to), by inexperienced handlers and more.

I do not accept the figure for infrastructure cost for any transfer to the SRA used, without a more sustained accountancy and mathematical modelling, which WTS says they did not do.

If transferred to the SRA, the increased strain and costs from the need for increased and experienced management time within SRA (there is for instance a difference when you are directly accountable for the outcome) will be acute and has a cost impact. The failure to allow marginal cost allocation of fixed operating costs and thereby to know the impact should not be brushed aside. Can, for instance the SRA produce a cost per staff member reduction in comparison to cost per staff in SIFL or not? I regard the one off infrastructure costs as a crucial factor in the consideration as you appear to be belatedly accepting and which has been qualified out of the report by WTS.

The separation of the indemnity Fund from the SRA is an essential protection for accountability and efficiency, it will retain the transparency of the system and thereby the reassurance of seeing straightaway what is going on without the process being subsumed in a bigger structure blended in with other responsibilities and more dependent on more extensive priorities and considerations.

Anyone who has experience in the insurance industry (see for example, Berkshire Hathaway) will know that the cost of claims is met not from the premiums per se but from the investment returns of those premiums pending payment of the claims. So, this is a crucial unknown not adequately dealt with, a major signifier of what approaches should be taken although to an extent unknowable. Due to this fundamental issue, the investment function must be prioritised and set aside as a specialism in it's own right focused only on the object of the need to indemnity. In addition, I do not accept that the SRA has the know-how and expertise (nor will it want to develop such for instance in-house) either to realise this fully enough and nor will it be able to justify and majorly address this issue as a proper place for it's own skill set. A separate SIFL should have to do this and from it's focused vision, it can do and should do and ought to do it better thereby. The fact that the SRA is willing to accept a Report on such a significant change as it is now proposing without addressing this matter in priority detail appears to indicate that it has not appreciated this point as it should.

The SIFL should remain functioning as it is, it is up to the SRA to prove that a transfer to the SRA is sufficiently justified and not just take into account as yet insufficiently proven cost factors and a lack of independent vetting of expectations that the SRA's pluralism will offer a better management of the process and outcomes. The limitation of SIFL's claims knowledge for proportionate cost assessment purposes maybe for a good reason, the same reasons that the SRA will be faced with and may find it has to do the same.

Of course, the SRA thinks it's management will do a better job but why, some independent third party can judge that not the SRA, it is partial. The subsuming of the indemnity fund in the SRA will weaken the overall function of the SIF, and the need for transparency, cost control, expertise and credibility.

The WTW Report for the reasons outlined above is not a proper basis for such significant changes and the SIF should remain where it is.

11.
2) Do you have any views on our revised draft regulatory and equality impact assessments?

No, save as above.

Received by email

Response to the SRA's open consultation in respect of consumer protection for post six-year negligence claims

I am very pleased to see that there is to be a new solicitors indemnity scheme/consumer protection scheme operated by the SRA.

The provisions that I would like to see in the final document are as follows:-

1. That the scheme will be permanent and in particular that there is to be no 'sunset' clause or similar clause.

2. That the new scheme will never be merged with or become part of the compensation scheme and that the two will remain entirely separate.

3. That solicitors' clients of any description will be eligible to claim against the fund with no restrictions based on the size or monetary value of the claimant or the type of work involved.

4. That the scheme will provide the same protections for consumers and solicitors as has been provided by the SIF.

5. That the above provisions will be incorporated in the necessary rule changes.

It is also hoped that the running costs and costs per claim of the new scheme will be significantly lower than those incurred by the SIF.

No doubt you will kindly acknowledge receipt of this email.

Yours faithfully

The following respondents asked us to name them, but not to publish their responses.

Anthony Wilson

Benjamin Lansbury

We also received a number of responses from respondents who asked that we do not name them and do not publish their responses.