BIRMINGHAM LAW SOCIETY

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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