

**SRA BOARD**  
31 January 2023

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## **Consultation on consumer protection for post six-year negligence – analysis of responses**

This report sets out stakeholders' responses to our consultation on an SRA-run indemnity scheme to provide consumer protection for post six-year negligence. The current Solicitors Indemnity Fund (SIF) arrangements managed by the Solicitors Indemnity Fund Limited (SIFL) are due to close to new claims in September 2023. Following previous consultation, the SRA has decided to maintain consumer protection in this area at the same level of cover.

### **Consultation questions**

The consultation asked two questions.

Question 1

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

Question 2

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

### **Respondents**

There were 45 respondents. 32 responded in a personal capacity and 13 on behalf of an organisation. This is the breakdown of respondents.

<b>Individual respondents</b>	
Solicitors	17
Retired solicitors	7
Member of the public	1
Not stated	7
<b>Organisation respondents</b>	
Organisations representing solicitors	2
Local law societies	8
Other	3

### **The responses**

Most respondents did not provide substantive comments on the draft rules or the draft impact assessments. Instead, they broadly said they were pleased to see that we were proposing consumer protection arrangements for post six-year negligence that:

- would continue beyond 30 September 2023, the current closure date of the SIF, and

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- did not alter the scope of cover currently provided by the SIF

**Question 1**

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

Almost all respondents said they supported continued indemnity arrangements for claims arising after the expiry of the mandatory six years run-off cover. Many supported our proposed arrangements, while a few argued for the continuation of the status quo with the SIF being managed and administered by the SIFL or for arrangements to be run by another appropriate organisation.

Question 1 did not ask for a yes/no answer. So, this table sets out the numbers of responses that had overall positive comments on our draft rules and arrangements, responses that had overall negative comments, and responses which made other comments without stating whether they agreed with or were opposed to the proposal that the SRA manage and administer the SIF.

<b>Overall positive comments</b>	<b>Overall negative comments</b>	<b>Other</b>	<b>No response</b>
26	6	12	1

Those who were overall positive either agreed with our draft rules and arrangements, or agreed with them subject to specific points which they put forward (which are set out later in this report). For example, the Law Society stated:

“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.”

The Legal Services Consumer Panel stated:

“We commend the SRA for... develop[ing] 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.”

An individual respondent stated:

“A milestone has been reached. I am very glad the SRA now agree that PSYROC [post six year run off cover] 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

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provided by the SIF... it will now be essential to resolve the technical detail required to make the scheme fully and properly functioning.”

Another individual respondent stated:

“I am delighted to see that there is to be a new solicitors indemnity scheme/consumer protection scheme operated by the SRA and wish it every success. The elements I would like to see incorporated and included are: 1. That the scheme will be permanent... 2. That it will never be merged with or become part of the compensation scheme... 3. That all types of clients of solicitors will be eligible to claim against the fund... 4. That the scheme will provide the same protections for consumers and solicitors as has been provided by SIF...”

Some other respondents made similar points.

A few responses said that if we maintain consumer protection in this area then the information we used to support the proposal did not sufficiently justify transfer the management of the SIF to the SRA. Some expressed this as a general concern, for example Newcastle upon Tyne Law Society stated:

“...we are 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.”

Some of these respondents went on to argue that the arrangements should continue to be managed by SIFL or another appropriate organisation, for example the Law Society, or that such proposals should be consulted on. The reasons they gave included that the scheme should be independent of us as the regulator, that running such a scheme is beyond our remit as a regulator, that we do not have the expertise needed to manage an indemnity scheme, and that costs might increase. A group representing five local law societies stated:

“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.”

A solicitor stated:

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

The City of London Law Society stated:

“...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’

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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.”

A retired solicitor stated:

“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 key issues that respondents raised in relation to the issue of the SRA running the new arrangements are set out in more detail under ‘Other views/comments’ below.

### **Views on the draft rules**

The Law Society and a few other respondents provided specific comments on elements of the draft rules, covering the following points.

#### *Arbitration in the event of a coverage dispute*

Some respondents including the Law Society felt that the rules should continue to provide for independent arbitrators to be appointed by the President of the Law Society. But the Law Society also noted in its response that:

“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.”

#### *Maintenance and termination of the fund*

Some respondents including the Law Society stated that if the fund closes at some point in the future, decisions about the use of its residual assets for anything other than an indemnity purpose should remain with the Law Society. The Law Society also noted that:

“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.”

The City of London Law Society stated:

“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

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perspective of how costs are carried across different groups in the profession as against the benefits.”

*Notification of claims*

The Legal Services Consumer Panel stated

“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 e.g. a formal form, this should be tested with consumers to ensure comprehensibility and accessibility... The SRA should also produce a clear guide on how to complete the prescribed form (with Frequently Asked Questions as they emerge).”

Similar comments were made by a number of respondents.

*Language of the new rules*

Some respondents suggested that except for the changes needed to provide for SRA control of the SIF, the new rules should remain as close as possible to the current SIF rules, to reassure solicitors that the scope of indemnity is not changing. Others suggested a complete plain English rewrite of the rules to help consumers.

*Review provisions*

The City of London Law Society stated:

“We invite the SRA to include a specific periodic review provision in the proposed Rules... 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.”

*Management of the fund*

The Law Society acknowledged that the consultation was not seeking views on specific arrangements for managing and administering the fund. But they stated 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... 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.”

They went on to say:

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“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.”

The City of London Law Society stated:

“...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... It would also include reviewing the scheme's investments in accordance with the standard investment criteria from time to time.”

*Transparency*

The Law Society stated:

“Under the current rules, SIF Ltd is required to produce reports to the Law Society Council about the management and administration of the fund... 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.”

The Yorkshire Union of Law Societies stated:

“...If the members of the Law Society 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.”

### **Other views/comments**

Some respondents made additional comments relating to the transfer of management of the fund from the SIFL to the SRA.

*The SRA’s capacity to run the new arrangements and realise cost savings*

A group representing five local law societies stated:

“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...”

A local law society said:

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“...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... 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 [by] SIF is naïve, particularly if it is also intended that a proportion of what are very few claims will be dealt with in-house.”

*Use of SIF data and using the Assigned Risks Pool (ARP) as a comparative model*

A group representing five local law societies stated:

“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.”

*Acting as both regulator and indemnifier*

Some respondents were concerned that information provided to us for the purpose of the indemnity might then be used for regulatory investigations, potentially leading to unfair outcomes for some solicitors, although some respondents also noted the safeguards that could be put in place. For example the Yorkshire Union of Law Societies (YU) stated that they were:

“...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.”

*Need for prior consultation*

Some respondents felt there should have been prior consultation about the decision to move management of the SIF to the SRA before issuing the current consultation. Two local law societies stated:

“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.”

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“Whilst [we welcome] 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.”

In relation to this, an organisation representing five local law societies set out reasons for what they saw as flaws in our current proposals, including:

“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... 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;... Either no or inadequate consideration appears to have been given to investigating the alternative of achieving costs savings within SIF;... The transfer from SIF to the SRA was raised in neither the November 2021 consultation nor the Discussion paper dated 3 August 2022.”

## Question 2

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

Have views	Do not have views
12	33

There were few answers to this question, with many respondents stating that their views were already covered in their answer to question 1. The Law Society stated:

“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.”

The Institute and Faculty of Actuaries stated:

“We support the SRA's aims... 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. 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...
- 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.”