RESPONSE TO SRA DISCUSSION PAPER of 3rd August 2022

"Next steps on the Solicitors Indemnity Fund (SIF) and consumer protection for negligence claims"

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

From: Association of South Western Law Societies (ASWLS)

This response is submitted on behalf of ASWLS. The members of the association are the following six local law societies located across the south-west region:

- Monmouthshire Incorporated Law Society
- Bristol Law Society
- Gloucestershire & Wiltshire incorporated Law Society (GWILS)
- Devon & Somerset Law Society (DASLS)
- Plymouth Law Society
- Cornwall Law Society

Introduction

We are glad of the opportunity to have some input into the SRA's latest ideas about the future of SIF and PSYROC.

Practitioners are busy people and, to state the obvious, they are not remunerated for giving up their spare time or eating into their fee-earning time. Therefore, we don't expect that there will be a huge number of responses to this paper, even more so at this time of year with many people away on holiday.

An enormous effort by many individuals, organisations and representative bodies, not to mention time and expense, went into the responses to the first consultation in January. We stress that the prospect of another consultation in the autumn is a depressing prospect. If there is a low response rate to this paper or any further consultation, this should not be taken as a lack of interest or concern.

It is earnestly hoped that the SRA will finally see fit to accept the overwhelming weight of opinion already expressed - that the current system of providing PSYROC through SIF works. If so, another costly consultation and all its associated uncertainty of outcome can be avoided.

Summary of our position

We refer you to our detailed response to the first consultation. Our views have not changed.

SIF should be retained as it is, and maintained financially with an annual firm levy as necessary. There are ways of reducing running costs - *without* bringing it all inhouse under the SRA, without reducing the scope of cover, without any kind of merging with the Compensation Fund, and without creating any other form of compensation scheme. The current model of SIF does not need dismantling and recreating. SIF has worked perfectly well until now, and it can continue.

Below is an extract of what we said in our response to the first consultation, being a summary of our ongoing position:

- In order to protect consumers of legal services, and to maintain public confidence, PSYROC (post six year run off cover) should and can be continued indefinitely in its current form through SIF.

- SIF can be financed by a small annual levy imposed on the practising profession with the PC fee. This could be an individual levy of £16 or a flat firm levy of £240. We favour a flat firm levy. This is a simple and obvious solution. It is a solution suggested by WTW in their actuarial analysis. We commend the SRA for commissioning this actuarial report.

- To close SIF would put the SRA in breach of its regulatory objectives and its obligations under The Legal Services Act (2007). If SIF is closed there will be long-reaching and damaging consequences for consumer protection, the reputation of the profession, public confidence, diversity in the profession, and access to legal services.

- A decision by the SRA to close SIF would at best be a perverse, irrational and unreasonable exercise of its discretion. At its worst, some might even consider a decision to close SIF as an abuse of the SRA's power.

- A decision to keep SIF going would be a proportionate and wholly justified course of action. The solution to keeping SIF continuing indefinitely is obvious and straightforward. No other solution is available for the provision of PSYROC.

In press releases issued by the SRA and The Law Society following the consultation it was made clear that the SRA accepted that there is a need for PSYROC. We are glad to see that this acceptance is confirmed in this latest discussion paper. Moreover, the paper makes clear the SRA's recognition of the profession's willingness to fund the cost of ongoing consumer protection via a levy, without this cost being passed onto their clients.

But, for reasons which are impossible to fathom, the SRA still seems determined to get rid of the current model for providing PSYROC, which of course is SIF, and set up some other untested model. The given reason in the paper is based solely on a concern about costs and a desire to reduce the costs of providing PSYROC.

Even more concerning however, is the statement in the Discussion Paper that:

"*If our Board decides that some form of protection should be maintained, we will consult on proposed future arrangements in autumn 2022. As with all our regulatory arrangements, any future consumer protection for post six-year negligence would then be kept under review in the light of the available evidence of its effectiveness and proportionality."*

This suggests that after all the discussion and consultation, the SRA Board still needs convincing that any form of PSYROC should be maintained. Regrettably, the SRA are creating continuing uncertainty over the destiny of SIF and PSYROC and consequent concern and anxiety. This is damaging to consumer confidence and the well-being of the profession.

We now have a situation in which the SRA have agreed to an extension of SIF to 30 September 2023, subject to approval by the Legal Services Board – which we assume is forthcoming. Once again the profession, and the public, are facing a cliff-edge.

Running costs and overheads

One needs to distinguish the running costs and overheads of SIF from the costs or levels of claims paid out (to be dealt with further on in this response).

Although it is possible, and indeed desirable, to reduce running costs and overheads, we have previously stated that the current running costs are still proportionate. The one good reason for reducing running costs is to ensure that the existing reserves can last even longer, without the need for top-ups by the profession.

A reduction in running costs and overheads can certainly be achieved, but NOT by somehow absorbing SIF into the Compensation Fund, nor by bringing PSYROC inhouse under the umbrella of the SRA.

The SRA will, or should, be aware of the staffing levels at SIF. At present there are only three staff at SIF, and we understand that none of them are legally qualified. One person deals with claims. That inevitably creates a situation where no claims can actually be handled inhouse. Our understanding is that everything is farmed out to panel firms - notifications of circumstances, and claims alike.

In particular it seems reasonable to suggest that most notifications can simply be noted and logged for future reference if needed. PII Insurers, on receiving notifications from practising firms will, where appropriate. and possible, advise the solicitors' firm to take rectification action. But nothing can be done to rectify possible errors once a firm has closed. So logging of notifications of circumstances by SIF, not referrals to panel firms, is the sensible course of action.

Blanket farming out to expert panel firms is inevitably expensive, and in many cases likely to be inappropriate. The solution is to bring claims handling inhouse, within SIF.

Qualified solicitors who should be experienced in litigation and professional negligence claims should be recruited onto the staff at SIF to work inhouse. This is how SIF used to be run "in the old days", and it worked well and efficiently. Panel firms were used back then, and will still be needed. But the instruction of panel firms should be on a targeted and justifiable basis.

Professional indemnity insurers, thankfully, have been very willing to contribute positively to the discussions and consultation on SIF. We feel sure that, if asked, they could give the SRA an insight on how to manage claims and keep running costs at a reasonable level. After all, insurers are the experts on this.

Other options

The discussion paper provides no evidence for its assertion that other "*options are likely to be significantly more cost effective and proportionate than the current form of SIF."*

It is extremely unlikely that replacement of SIF with some new consumer protection arrangement would ever be cost effective. The costs of the reorganisation to bring about the change are itself likely to be substantial. The huge danger is that the SIF reserves which are composed of monies paid in by the profession, and which have remained remarkably stable over the past few years, would soon be dissipated.

The money in the SIF pot must remain ringfenced, to be used for the purpose for which it was intended – to indemnify former clients against the negligence of solicitors' firms which closed more than six years ago. The costs involved in any creation of a model other than SIF will inevitably eat into the fund.

The SRA say in the discussion paper that they have the powers "*to set up a new SRA consumer protection arrangement as an indemnity scheme or a compensation fund"*. That may be the case, but it does mean that to do so is justifiable. Indeed to do so would be morally reprehensible and an abuse of the SRA's powers.

The discussion paper also states that "*Any further consultation ……. may also include consideration of the potential to use assets currently held by the SIF to fund the operating costs of a future consumer protection scheme for a period and/or to generate investment income to help to offset the scheme's future operating costs".* This statement itself demonstrates that there is no intention to ringfence the SIF pot.

As a side-note and in case it's been forgotten, the assets in the SIF pot already generate investment income and can continue to do so.

We commend the response to this discussion paper submitted by Howden Insurance Brokers. As Howden have pointed out, any SRA inhouse PSYROC scheme has the potential for conflicts of interest to arise if PSYROC arrangements are brought within the SRA. To quote Howden:

"This could occur where there is an SRA investigation or SDT proceeding in relation to the same matter that is also the subject of a civil claim under PSYROC arrangements. The SRA would be acting as prosecutor/investigator and also determining the issue of indemnity for the claim, claimant costs and the solicitor's defence costs."

SIF is an indemnity scheme and should remain as such. Any kind of compensation fund, whether a newly created arrangement or some extension or merging with the existing Compensation Fund will change the protection provided by the existing PSYROC from one of indemnity to one of a purely discretionary scheme of last resort. Clients will still be able to take proceedings against the solicitor for any claim not met or any shortfall in the compensation payment. This will create immense uncertainty, and confusion, both for the public and the profession. And the reputation of the profession and its regulator will be damaged. We have discussed this reputational point in our response to the consultation.

Other issues

Protection for large corporate claimants Presumably the SRA will be looking into the historical profile of claims to find some evidence for the notion that excluding corporate clients from protection would save money. But any savings there might be in the costs of claims will not be worth it. To reduce the scope of cover in any way at all will create confusion and uncertainty. This was all addressed in the January consultation. An indemnity scheme does not pick and choose between claimants.

To exclude large corporate clients from protection would exclude mortgage lenders. This would mean a very significant number of claims arising out of conveyancing claims would not be covered. Inevitably lenders will end up pursuing borrowers (e.g. in the event of a forced sale and a shortfall); and the borrowing public will be left trying to pursue solicitors who have long retired, with all the attendant problems we have discussed before.

There will be unintended consequences. Mortgage lenders will no longer instruct sole practitioners and small and high street firms, resulting in firms having to cease undertaking conveyancing work. Consumer choice will be severely affected. Competition in the market will be affected. The legal landscape will change, and in a way that will not be in the best interests of the public.

To say this would be a good idea just because the Compensation Fund excludes claims by corporations, businesses, charities etc of a certain size, is no argument at all. There was a lot of opposition to this change in the Compensation Fund rules at the time. And for good reason.

Claimant costs Reducing costs on both sides is a worthy aim, and this really boils down to settling claims quickly and efficiently, especially where the case is straightforward However, to change the scheme so that claimant costs are not paid would be completely counterproductive. This would see a rise in the number of unrepresented clients, leading to delays and an increase in the costs of dealing with claims. Further, claimants are not prevented from pursuing retired solicitors for their costs bill. Again this creates uncertainty and is damaging to all concerned.

Recovery of excesses It is pointless to talk in terms of encouraging good risk management when the firms concerned closed their doors over six years and even decades earlier. It would be interesting to know how often the present SIF power to recover excesses has been used successfully. It would mean an enquiry into the applicable level of excess in the last PII policy, locating the retired solicitors, taking proceedings, trying to enforce a judgment. The costs of doing all that make it a fruitless exercise.

Further enquiries

We note that since the consultation outcome the SRA has

(a) commissioned consumer research;

(b) engaged with the Legal Services Consumer Panel which gave a very strong, hard-hitting response to the first consultation, and which stated that "*The Panel's preferred option is to maintain SIF for the whole market. We are therefore in support of a levy on the profession to cover this cost"* ; and

(c) engaged with representative bodies whose solicitor members undertake legal work susceptible to long-tail negligence claims.

This research and engagement is commendable. We note further that the SRA has by these means identified evidence to support the concerns raised in the consultation. That is gratifying but not surprising.

In response to the last consultation, an excellent report was commissioned by the Sole Practitioners Group from independent accountants Honeycomb. The reserves in the SIF pot are substantial and the report shows that the amount has not altered significantly for several years now. The Honeycomb report sits very usefully beside the SRA's commissioned report by WTW which demonstrated that a very small levy on the profession would be enough to keep SIF going.

Notably , the Honeycomb report demonstrates that there are sufficient funds and investment income available to keep SIF going for years without any extra funding.

Even so, as the SRA acknowledges, the profession has already expressed willingness to pay a levy whenever necessary to keep SIF going. The collection of a flat levy on

solicitors' firms would be a low cost exercise, to be carried out by the SRA with the collection of the PC fees.

We urge the SRA to consider the Honeycomb report. That step should complete the SRA's enquiries which, combined with the consultation, have already been extensive. It should all be enough to convincingly persuade the SRA Board that there is only one solution, which is to retain SIF as the appropriate model for providing PSYROC. Another expensive and time-consuming consultation should be strenuously avoided. The answer will not be any different from the answer already clearly given by the profession.

Conclusion We cannot see any sensible or rational reason to dismantle SIF and turn it into some other model, even less a model with reduced cover, or cover that is discretionary. SIF works well and should be maintained as a separate entity, outside the SRA.

Solutions as suggested above can easily be found for reducing its running costs and overheads of SIF.

In the light of the evidence, it is very difficult to understand the apparent determination of the SRA to bring an end to SIF in favour of some other untested model which will severely weaken existing public protection.

29 August 2022

Janis Purdy SRA No 115220
Hon Secretary ASWLS
For and on behalf of ASWLS
janis.purdy@gmail.com

This response is approved by the six local society members of ASWLS

ASWLS GIVES CONSENT FOR THE PUBLICATION OF THIS RESPONSE.

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