Consumer protection for post six-year negligence

SRA Consultation Response

February 2023

Contents

Executive summary

In this report we present the responses to our October 2022 consultation on arrangements for consumer protection for post six-year.

The consultation:

- set out the reasons for the SRA Board's decisions to maintain consumer protection for post six-year negligence claims providing the same level of protection as the Solicitors Indemnity Fund (SIF) and
- invited views on the draft rules for the future scheme, and on its regulatory and equality impact.

The consultation closed on 3 January 2023 and received 45 responses. Most of the responses supported the continued use of SIF to provide consumer protection for post-six-year negligence claims. A small number of responses raised questions about the SRA's decision to manage and administer SIF and our approach. This report summarises the issues raised and sets out our response to them.

Some responses raised specific issues about the draft rules. In response the SRA Board has agreed to make two material changes to the rules. These changes relate to:

- The appointment of an independent arbitrator in the event of a dispute on the coverage of the scheme. And,
- Deciding on the use of the residual assets of the scheme if it is closed at some point in the future.

The Board has made the final rules, and we are now seeking approval of the rules by the Legal Services Board (LSB). We are planning to take control of SIF from 1 October 2023. Between now and then we will publish updates for stakeholders on our implementation work.

Background

In 2021 we launched a public consultation on the future of indemnity cover for loss where negligence comes to light more than six years after a law firm closes with no successor. The consultation set out our then preferred option that SIF should cease to provide cover for post six-year claims after September 2022. And that our future regulatory arrangements should not include post six-year protection. This was on the basis that this protection was not a proportionate arrangement, because of its high cost and the limited number of consumers who benefit from it.

In April 2022 the SRA Board noted that the consultation had indicated that removing post six-year protection could have a greater impact on consumers than was suggested in our initial analysis. It also noted that solicitors appeared willing to fund the cost of ongoing protection via a levy. And did not expect material costs to be passed on to consumers as a result.

In view of this, the SRA Board wished to explore further the options for proportionate consumer protection for post six-year negligence. The Board agreed to seek a 12-month extension to the deadline for new claims to be notified to the SIF - to 30 September 2023. This was approved by the LSB on 1 September 2022.

To support our consideration of the cost effectiveness of the options that might be available to us, we commissioned expert independent advice from the consultancy arm of Willis Towers Watson (WTW).

We issued a discussion paper in August 2022 outlining the options being considered and inviting views on some specific issues. This was discussed with the Law Society, the Sole Practitioners Group, the Legal Services Consumer Panel (LSCP) and our post six-year virtual reference group.

In September 2022, the SRA Board noted the responses to the discussion paper and decided to:

- Maintain consumer protection for post six-year negligence as an SRA regulatory arrangement, providing the same level of cover as SIF
- Provide this protection through an indemnity scheme operating under the direct control of the SRA to ensure appropriate oversight and governance of the scheme, to enable us to collect and analyse more information about the consumer protection it provides, and to realise potential cost efficiencies which had been identified in the WTW report
- Consult on the arrangements and rules for the future indemnity scheme.

We issued that consultation in October 2022, setting out the reasons for the Board's decisions and inviting views on the draft rules for the future scheme, and on its regulatory and equality impact. The report prepared by WTW was published alongside the consultation.

The consultation explained that the draft rules use a provision in SIF's current rules (the SRA Indemnity Rules 2012) which allows us to designate the SRA as the body responsible for holding and managing SIF. We would manage SIF through our established operational infrastructure, with outsourced expertise as needed, and that this would result in cost savings compared to its existing management arrangements. WTW had assessed the capability of the SRA, in partnership with a suitable outsourced claims handler, to provide a post six-year indemnity scheme and were confident that we could provide a fit for purpose arrangement with only slight changes to existing operations[1].

[1] Page 31 of the WTW report

Overall feedback

The consultation closed on 3 January 2023 and received 45 responses. This is the breakdown of respondents.

Individual respondents	
Solicitors	17
Retired solicitors	7
Member of the public	1
Not stated	7
Organisation respondents	
National bodies representing solicitors	2
Local law societies	8
Other	3

Most responses generally supported continued arrangements for claims arising after the expiry of the mandatory six-year run-off cover provided by insurers.

Some responses argued that the arrangements should continue to be managed by the Solicitors Indemnity Fund Limited (SIFL) or another organisation such as the Law Society. Reasons given included that the scheme should be independent of us as the regulator, that running such a scheme is beyond our remit as a regulator, and that we do not have the expertise needed to manage an indemnity scheme. We discuss these points in the next section of this report.

Some respondents were concerned that given previous proposals to close the SIF, we might seek to do so again after taking it under our control. The October 2022 consultation set out the reasons for our Board's decision to continue to provide consumer protection for post six-year negligence via an SRA-controlled indemnity scheme providing the same scope of cover as now. It also noted that this approach would allow us to keep under review the costs and benefits of this protection. SIF's funds are ring-fenced for the purpose of post six-year consumer protection. If we were to decide in future to propose to close SIF or change the scope of its cover, we would have to make a clear evidence-based case for altering the level of consumer protection for post six-year negligence. Any such changes would then be the subject of public consultation and would require approval by the LSB.

Responses also raised questions and concerns about other general and policy issues, including our approach to consultation, the evidence to support our proposal, the language and construction of the rules, the management and reporting of the

future scheme, and the separation of our indemnification and disciplinary functions. These issues and our response are discussed later in this report.

A few consultation responses provided substantive comments on the draft rules. The Board agreed to make some changes to the final rules in response, and these are discussed later in this report.

Responses did not raise any concerns about the regulatory and equality impact assessment set out in the October 2022 consultation.

General points raised and our response

Scope of consumer protection

The consultation set out the reasons for the SRA Board's decision to maintain consumer protection for post six-year negligence as a regulatory arrangement, providing the same level of indemnity cover as is currently provided by SIF. Almost all of the responses to the consultation supported this decision.

Failure to consult

Both the City of London Law Society (CLLS) and the Joint V Law Societies (representing Birmingham, Bristol, Leeds, Liverpool and Manchester Law Societies) raised concerns about the SRA's failure to consult on several issues:

CLSS and Joint V said the SRA did not consult on the two decisions made by the Board in September 2022, namely, to maintain post six-year consumer protection as an SRA regulatory arrangement providing the same level of cover as SIF, and to provide this protection through an indemnity scheme operating under SRA's direct control, as opposed to continuing with a reconfigured Solicitors Indemnity Fund Limited (SIFL) operating at a lower cost level.

Joint V also stated that the SRA did not consult on 'transferring' the fund from SIFL to the SRA and alleges that this was not raised in either the November 2021 consultation or the Discussion paper dated 3 August 2022.

SRA response

The 2021 consultation discussed whether post six-year consumer protection should continue. That consultation clearly established that both the profession and consumer representatives wanted to maintain this protection. As set out in the October 2022 consultation, the SRA Board has now decided that there should be a scheme providing the same level of consumer protection as previously. There was therefore no need for a further full public consultation on whether to maintain post six-year consumer protection, or how the future scheme would be controlled.

In any event, the SRA issued a discussion paper in August 2022 which proposed maintaining post six-year protection, and explained that the options for delivering future consumer protection included retaining the SIF with changes to reduce operating costs, and replacing SIF with a new consumer protection arrangement operated from within the SRA. The SRA invited responses to that discussion paper, and carefully considered the 116 responses, including from key stakeholders such as the Law Society, the Sole Practitioners Group, CLLS and the Legal Services Consumer Panel. Most responses were in favour of maintaining post six-year consumer protection , and while most supported retaining the SIF, others did not

object in principle to an SRA-run scheme providing the same cover as SIF. So the Board's decisions in September 2022 were only taken after appropriate discussion and consultation with key stakeholders.

The rules on which we consulted in October 2022 deliver the SRA Board's preferred option of an indemnity fund controlled by the SRA, with the same scope of cover as at present. The rules do this by providing for us to take over the management of SIF, using a mechanism in the current SIF rules which provides for the SIF to be managed by another person as an alternative to SIFL. The alternative would be to achieve the same outcome by closing the fund, establishing a new fund and transferring SIF's assets to our control. We believe this is unnecessary. The approach we have used in the rules is – in effect – simply the most straightforward legal and operational way of bringing SIF under our control with the same scope of cover as at present.

Lack of evidence to support transfer to SRA-controlled body

CLLS and the Joint V Law Societies said that the WTW report that was included with the consultation was not adequate to support the argument that the SRA can run the future fund more cost-effectively than SIFL. Following on from that, CLLS asked for the SRA to include a specific periodic review provision in the Rules, set at 18 months. The Joint V Law Societies argued for more detailed information and costings on the transfer from SIFL to the SRA and the alternative proposal of a reconfigured SIFL operating at a lower expense level. The Joint V said that:

- The anticipated cost savings in the WTW report were calculated by reference to the costs of the Assigned Risks Pool (ARP), which is not a realistic comparable.
- The cost savings were predicated on claims being handled by the SRA in-house, but the SRA is unlikely to have the necessary expertise to handle such claims.
- Consideration of the handling of the SIF's residual liabilities, including pre-2000 firm closures and existing notified claims, was excluded from the October WTW report.
- No or inadequate consideration was given to the alternative of achieving costs savings within the SIF.

Some responses argued that the scheme should be independent of us as the regulator, or that running such a scheme was beyond our remit as a regulator.

SRA response

The consultation set out the reasons for the Board's decision to provide future consumer protection for post six-year negligence via an indemnity scheme under the control of the SRA. This arrangement will provide appropriate oversight and governance of the scheme. It will also enable us to collect and analyse much more information about the consumer protection provided by post six-year negligence cover.

The consultation also explained that the WTW analysis of the options for future post six-year consumer protection had identified potentially significant annual cost savings compared with the option of maintaining SIFL as an independent entity. The cost savings identified by WTW were based on analysis using the available data from a range of schemes including SIF, the ARP and the cover provided by the SRA Compensation Fund for uninsured losses. The analysis was carried out by WTW claims handling experts who were fully briefed on the differing nature of these schemes, talked to everyone in involved in running them, and looked closely at the likely cost savings of providing post six-year protection via an SRA-controlled mechanism. The analysis considered a range of scenarios, including the use of a reconfigured SIFL as well as indemnity and compensation funds controlled by the SRA.

The WTW analysis assumed that claims would be received into the SRA and then managed by outsourced claims handlers experienced in handling complex legal issues and professional negligence litigation. We already use outsourced claims handling for the ARP and for uninsured loss claims to our Compensation Fund, which have some comparable features. We specifically asked WTW's experts to review the capability and cost-effectiveness of such an arrangement for post six-year protection. They did so and confirmed it is fit for purpose with some small operational changes. Our implementation plan is structured accordingly.

The handling of residual liabilities was not considered by WTW. As part of our implementation work, we are considering whether these liabilities should be handled by the arrangements we are putting in place to manage new claim notifications or placed elsewhere.

On the point about our remit, the SRA Board has decided to maintain post six-year cover for consumer protection as part of our regulatory arrangements, which include "indemnification arrangements" under s21 of the Legal Services Act 2007. Therefore bringing the scheme under our control is clearly within our remit as a regulator.

As a more general point, some of the concerns expressed in consultation responses about our ability to manage the scheme seem to assume that the SIF is an insurance scheme. However, SIFL is not an insurer and does not operate as one. SIFL manages and administers the SIF as an indemnity fund delivering a niche function, handling only post six-year claims and claims relating to firms that closed before 2000.

Language and construction of the rules, including waivers, decisions about non-compliance, and use of a prescribed form

Some respondents including the Law Society suggested that except for the changes needed to provide for SRA control of 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. The Law Society highlighted the removal of current rules enabling the SRA to waive any obligations on solicitors or firms arising under the rules, and to treat insignificant non-compliance with the rules as compliance. Other respondents suggested a complete plain English rewrite of the rules to help consumers.

The Law Society and the Legal Services Consumer Panel also noted that the rules provide for claims to be notified to the SRA in a prescribed form and said this should be designed to be user-friendly.

SRA response

The new rules provide the same scope of indemnity as the current SIF rules but are framed in a way more consistent with our other Standards and Regulations. For instance, as the Law Society noted the new rules do not make specific provisions about waivers or how we will respond to non-compliance with the rules. This is because we will rely on our waivers policy and enforcement strategy respectively, as we do with our other rules. This will ensure consistency of approach with our other regulatory arrangements and should ultimately reduce the risk of confusion for consumers or the profession.

The requirement in the rules to use “the prescribed form” to notify claims means that a notification must be made in a manner and containing the information we may specify, rather than that claimants must fill in a particular form. SIFL currently asks that claim notifications are made via a form provided on their website.

As we prepare for implementation, we will consider how best to provide information to consumers and solicitors who will engage with the scheme, including to:

- help consumers to understand how to make a claim without having to engage with the technical rules of the scheme, and to consider whether they should seek legal advice in connection with their claim
- explain that we can make reasonable adjustments if a consumer finds it difficult to make a notification
- explain to solicitors why the drafting approach in the new rules differs in some respects from the current rules, and that the scope of cover remains the same as before

- confirm that the arrangements provide the same scope of indemnity as they did prior to 1 October 2023.

Performance reporting and review

The Law Society in its response raised concern about removal of the requirement for SIFL to produce reports to the Law Society. The Law Society and the Legal Services Consumer Panel have also asked the SRA to produce regular reports analysing claims data.

SRA response

The consultation noted that delivering consumer protection for post six-year negligence via an SRA-controlled indemnity scheme would:

Provide us with clear oversight of the arrangement's operating costs and risk management decisions, and access to relevant management information about operations and claims.

Enable us to report transparently on, and keep under review, the costs and benefits of post-six-year consumer protection.

We are committed to transparency on the operations of the future scheme. As an absolute minimum we will report as frequently as SIFL does, but we expect to provide more information than that. As part of our implementation plans, we are developing a framework to record, analyse and report on data about the functioning and impact of the future scheme.

We also recognise the Law Society's residual role as an approved regulator and our obligation to give it assurance as to how our arrangements are run. That obligation is currently fulfilled through the reporting mechanism set out in the Assurance Protocol. We will continue to engage with the Law Society to discuss any amendments to the Protocol that are needed to reflect the future scheme.

Management of the fund and its assets

The Law Society's consultation response sought greater clarity about the SRA's approach to the maintenance and use of the core capital in the fund and requested that the SRA provides a business plan/budget for the new scheme when it submits its rule change application to the LSB. CLLS in its response suggested that there should be a specific duty in the rules on us to have regard to standard investment criteria and to take proper advice from a suitably qualified person in managing the scheme's funds

SRA response

The WTW report which accompanied the consultation identified scope for a future scheme to realise cost savings by optimising its asset and liability management. This includes the approach to reserving against claims and insuring SIF. In the 2022 consultation we noted that the future financial strategy for the scheme would also involve consideration of the potential to use SIF's existing assets to contribute to the running costs of the scheme. And/or to take a more targeted approach to future investment to generate returns to help support the scheme.

We will continue to engage with stakeholders on this topic. We have commissioned expert advice on the transition from SIFL to the SRA, on topics including:

- the future provisioning policy and capital reserves policy of the fund
- the scale and timing of any future levy funding
- the future handling of the SIF's historic claims and future liabilities
- considerations around the future asset and liability management approach of the SIF, building on issues identified by WTW, and
- the need for and timing of any new actuarial assessment to support these decisions.

We do not consider it necessary to have a specific rule about the need to review the arrangements and its financial performance. The rules bring SIF under our control as part of our regulatory arrangements, and we will keep its proportionality and effectiveness under review as we do with all our regulatory arrangements.

Immediate contributions from the profession

The Law Society response argued that we should not consult on the question of any future levy, but should impose a levy from the outset to preserve capital in the fund.

SRA response

As set out above, we are commissioning expert advice to help inform how SIF is managed and maintained. This will include exploring the scale and timing of any future levy funding. Given SIF's current financial position we do not consider it necessary to impose an immediate levy on the profession.

We will ensure continued expert advice on the future management of SIF as required. This will inform our reserving policy on an ongoing basis and the need for and timing of any levy. If we consider in the future that it is necessary to collect a levy from the profession to help fund the arrangements, we will consult on proposals as we committed to do in the October 2022 consultation.

Separation of indemnification and disciplinary functions

The Law Society and some other respondents raised concerns that there could be a conflict of interest between the SRA's role as provider of indemnification and as disciplinary body, with information being shared between the two functions in a way that could lead to unfair outcomes for solicitors.

SRA response

In the October 2022 consultation we recognised the need to manage the handling of post six-year claims to ensure fair and effective processes and appropriate outcomes across our functions. We acknowledged that such cases will be rare, and that we already manage similar issues in other areas. For instance, PII insurers of SRA firms have obligations to report concerns to us under the Participating Insurers Agreement and claims to the Compensation Fund can also identify regulatory concerns. Further, solicitors and firms are under an obligation to self-report regulatory concerns.

We have carefully considered the concerns that have been raised during the consultation, including in discussions with the Law Society. We have confirmed that our approach to managing cases will include:

ensuring that valid claims are not unnecessarily delayed or otherwise affected by disciplinary considerations such as investigations

arranging that information arising from claims to the scheme is only passed to our investigation and supervision team by claim handlers if it indicates a serious regulatory breach.

Our implementation plan includes reviewing the internal processes, training and support that will be needed to ensure that claims and any information received are dealt with appropriately and effectively.

Regulatory and equality impact

In response to our consultation in 2021, some stakeholders raised concerns that reducing or removing the consumer protection provided by SIF could indirectly disadvantage people with certain protected characteristics. This could include older solicitors and those from a Black, Asian and minority ethnic background. This was because of the profile of solicitors in smaller firms, which are more likely than large firms to close without a successor business. Or are firms at risk of claims arising after the expiry of six years run-off cover.

Alongside our 2022 consultation we published updated draft regulatory and equality impact assessments. The equality impact assessment said that given the decision to maintain consumer protection via an SRA-run indemnity scheme, the concerns raised during the 2021 consultation no longer applied, and we had not identified any likely equality impacts on specific groups of regulated individuals or consumers. The regulatory impact assessment said that since our approach involved no change in the

scope of protection offered to consumers, we had not identified any significant impacts.

Responses to the consultation did not identify any further regulatory or equality impacts. The Law Society said it was satisfied that to the extent that the new arrangements would replicate the protections provided by SIF, it would benefit solicitors and the consumers that make use of their services.

As part of our future management of SIF we will be able to monitor and report on its impact on solicitors and consumers as we collect better information about the consumer protection provided by the scheme.

Changes to the draft rules

Some respondents made specific suggestions about the draft rules that were included in the consultation. We have made two material changes in response to the suggestions which are discussed below.

Arbitration in the event of a coverage dispute

The draft rules provided that a dispute about whether a claim is within the scope of the indemnity will be referred to a sole arbitrator, to be agreed by the indemnified and the SRA or to be appointed by an SRA authorised decision maker, for determination. The current SIF rules provide for an arbitrator to be appointed by the President of the Law Society. The Law Society's consultation response argued that there may be concerns that if the SRA is responsible for the appointment of an arbitrator, the appointee may not be impartial. This was supported by some other respondents

SRA response

We sought views from SIFL about what had been said and it advised us that the arbitration mechanism is very rarely used so did not have any firm thoughts on the proposed rules. However, to provide greater reassurance that any appointment of an arbitrator will be fair, we have amended the rules to provide that where an arbitrator is required the SRA will invite an appropriate independent body to appoint the arbitrator. Bodies such as the Chartered Institute of Arbitrators (CIArb) and the Centre for Effective Dispute Resolution (CEDR) run independent schemes to appoint arbitrators in disputes.

Maintenance and termination of the Fund

SIF's rules currently provide that if the scheme closes and the SRA does not identify an alternative indemnity purpose for its assets, the Law Society may decide how to use the residual assets for the benefit of the profession. The Law Society's consultation response noted that the draft rules left the decision on the use of these residual funds to the SRA and argued the Society should retain a role in this.

The CLLS suggested that the draft rules should include an explicit power for the SRA to terminate the arrangements if they cannot be run in a proportionate way or become disproportionate or unfair.

SRA response

We have reconsidered the question of decisions on the use of residual funds having regard to the reasons for the establishment of SIF and the Law Society's role in making decisions about the use of residual funds for which there is no alternative indemnity purpose. We have amended the final rules to provide that in the event of

the scheme closing, and where the SRA does not identify an alternative indemnification purpose for the residual funds, they will be transferred to the Law Society which will determine how they will be used for the benefit of the profession.

Having considered the suggestion made by the CLLS we do not consider it to be necessary. We will keep the proportionality and effectiveness of the SIF under review as we do with all our regulatory arrangements. Both SIF's current rules and our new rules include a general power to terminate the fund if we were to decide it was no longer necessary or appropriate to maintain it. Any such decision would be subject to our obligations to act fairly and proportionately and would be subject to public consultation and LSB approval.

Next steps

We are submitting our application to the LSB to approve the rules made by the SRA Board.

In the meantime, our operational systems and teams are preparing to take receipt of claims from 1 October 2023. Our planning work includes engaging with SIFL to ensure the smooth transfer of operations, selecting a suitable outsourcing partner to manage claims, any necessary IT changes, staff training, the development of web-based guidance and information, and both internal and external communication plans. We are also developing a framework to record, analyse and report on data about the functioning and impact of the future scheme.

We will continue to provide updates to stakeholders during the implementation period through the SRA Update or other channels.

Analysis of responses

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.

Individual respondents	
Solicitors	17
Retired solicitors	7
Member of the public	1
Not stated	7
Organisation respondents	
National bodies 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
- 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.

Overall positive comments	**Overall negative comments**	**Other**	**No response**
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 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' 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 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:

> "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:

> "…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."
>
> "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.”