



THE NOTTINGHAMSHIRE LAW SOCIETY

Post Six Year Run-Off Cover and The Solicitor's Indemnity Fund Response Of The Nottinghamshire Law Society To The SI's Consultation - November 2021

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Background to response

Nottinghamshire Law Society represents a little over 1400 solicitors both practising and retired who have associations with the City and County of Nottingham.

Never in the collective memory of its Council has it received so many responses from its members to an SRA or a Law Society consultation. Unanimously those responses are that the protection afforded both to clients and to retired solicitors by SIF's PSYROC should be retained as a fundamental client protection and that it is the duty of the SRA to maintain that protection.

Solicitors are uniquely exposed to long-tail claims where clients often do not realise errors until, for example, a death or a sale of a property which can be many years after a Will was written or a property purchased. Often, in the case of personal injury these claimants are the most vulnerable members of society.

By the same token once a solicitor ceases practice or retires he or she retains no control over future client protection arrangements and many a solicitor who is retired believing his or her firm will exist for years to come as a successor practice or continuing practice has found themselves powerless to prevent closure or merger and loss of PI cover.

Barristers through the Bar Mutual enjoy this protection, so too should solicitors.

Question 1

Do you have any views on our analysis in relation to continue to provide PSYROC through SIF on an ongoing basis?

1. The SRA's position is that it is not its role to protect solicitors. However, SIF was established under section 37 of the Solicitors Act 1974, the provisions of which protect not only consumers, whose interests must of course be the first consideration, but also solicitors and their staff: *Swain v The Law Society* [1983] 1 AC 598 at p.618 B-C.

Amendments to section 37 in the LSA 2007 did not affect this. (source: Legal Risk LLP <https://www.legalrisk.co.uk/publications/riskupdate-january-2022/>)

2. Whilst there is a supply of funds to meet a clear demand for PSYROC cover, the scheme should continue post 30th September 2022 and be reviewed at regular intervals as and when needs cease ("if it's not broke, why fix it?").
3. There is also the major problem of what happens to any money post 30th September not held back in reserve for claims intimated before the arrangement is terminated, which sum will be substantial.
4. The SRA's draft Equality Impact Assessment includes shortcomings:
 - 4.1 The data collated and analysed is limited to the impact based on:
 - solicitors - this should include staff and consumers who come under the SRA's remit
 - only a few protected characteristics rather than all and those solicitors coming from lower socio-economic backgrounds
 - historic claims - it should consider future potential claims in the light of demographic changes.
 - 4.2 It confirms that certain protected characteristics are impacted and yet goes on to say that the impact is "neutral"; this appears to be a contradiction in terms.
 - 4.3 It states "These are issues we will consider further in the light of responses to the current consultation" - the onus surely is on the SRA to show there is no equality impact; it is not on solicitors, their staff, consumers and other stakeholders to prove there is.

Yes - para 65 "closing the fund and purchasing cover to meet SIF's outstanding liability from a third-party insurer" - this appears to be a case of "cart before the horse" - what - if as seems likely - no commercial insurer has any appetite to quote?

Question 2

Do you have any further information relevant to our consideration of whether it is proportionate to consider providing PSYROC through the SIF on an ongoing basis?

We were surprised to read that consumer redress payments (and presumably claim costs) amounted to 58% of the annual costs of SIF and that 42% of its costs went in administration costs and overheads. That seems particularly surprising for an organisation that largely outsources its claims handling to panel solicitors and no longer employs claims staff.

We should have thought that, that economy of scale could be addressed by merging the admin side of SIFL into Chancery Lane.

However, a mutual model seems to us to be plainly the most economically efficient way of addressing PSYROC where there is no insurers profit element and no Insurance Premium Tax on contributions.

If, as we surmise, a large amount of the overheads costs seems to have been incurred in paying auditors and/or reinsurance and safeguarding the fund from claims that do not aggregate or are significant in amount then we should have thought that these could be

addressed through a cap on claims or the comfort of actuarially calculated levies (such as supports the Compensation Fund).

Given the projected annual cost to the profession of £16 per annum per solicitor or £240 for a firm on a flat fee basis we believe that the arguments in favour of maintaining such protection are overwhelming.

The SRA do not seem to have a grip on admin costs and therefore argue that the cost of keeping SIF is disproportionate to consumer protection. We see that equation the other way around- the small cost justifies the protection. As we say the administrative function could be incorporated within the compensation fund arrangements or Chancery Lane. A clear funding plan through an annual levy will remove the need for the cost of actuarial projections and reinsurance.

Question 3

Do you have any views on our analysis in relation to amending our MTC's to require the provision of PSYROC on an ongoing basis?

See response to Q.4

Question 4

Do you have any further information relevant to our consideration of the benefits and dis-benefits of amending our MTC's to require the provision of PSYROC on an ongoing basis?

If the SRA were so minded to look at closure of SIF then we do consider that amendment of the MTC's to provide 9 or 12 year PSYROC would be advisable. The added exposure of insurers to claims in these years is on these figures minute and if the insurers were paid the current levels of run off premium (often 3 times a firm's final year premium) insurers would not balk at this extension.

The WTW analysis of the number and value of PSYROC claims supports the view that the addition of a further three or six years to the currently mandated six-year PSYROC would add little to the cost of premiums. If one reckons the primary layer annual premium levels are £300 million such an extension would add about 0.3% to premiums.

Indeed, if the SRA and insurers were to mandate that all regulated firms obtained refundable security for payment of post-six-year run-off cover in all events (currently our members contacts with brokers inform us that around 50% of such premiums are never paid) this would be an easy and obvious solution. It would also free the SRA from the administration costs of profession funded PSYROC.

The SRA could require as part of its regulatory body approval of registered entities that a bond be taken out and placed with it in order to cover the prospect of default or that a refundable deposit were made to safeguard others against the cost of disorderly closure.

Question 5

Do you have any further information about the potential for PSYROC cover on the open market as a voluntary option?

The overriding consideration here is that insurers are generally accepted to have no appetite for this sort of cover on a practice by practice basis at all let alone on the basis of premium levels which are likely to prove attractive to willing takers.

The same considerations as preferred by the SRA re a Master Policy (Q.6 below and para 71) apply equally here

If that is wrong, good insurance risks will always find a market. Thus, if the SRA should close SIF then no doubt a market for PSYROC would emerge and those retired solicitors who have kept a good archive, had a good claims record in the first six-years post closure and who can afford it, would find cover.

The problem would remain for the disorderly closures and those who had a bad claims record.

A voluntary option would therefore provide only a patchwork of consumer protection and protection where it was least likely to be called upon ie claims against responsible and solvent retired solicitors.

Question 6

Do you have any views on our analysis in relation to establishing a master insurance policy for the provision of PSYROC on an ongoing basis?

Question 7

Do you have any further information relevant to our consideration of whether PSYROC should be provided on an ongoing basis to a master policy? In particular is there likely to be a suitable and cost-effective master policy available on the market?

If this is the SRA's chosen route, then a market will evolve. Such a market would differ little from the market in which SIF currently appears to be affecting its own reinsurance so it is hard to see an advantage in this solution.

A master policy for the profession worked pre the formation of SIF in 1987 and there is no reason why it could not provide a solution- but at a cost. As the consultation paper notes payments of premium would incur insurance premium tax and of course the carrier for such a provision would require a profit element which is not present in a mutual fund such as SIF run by TLS or the SRA.

Question 8

Do you have any views on our analysis in relation to regulatory arrangements for an alternative model for the provision of PSYROC on an ongoing basis?

Question 9

Do you have any further information relevant to our consideration of whether there should be regulatory arrangements for PSYROC to an alternative model? In particular do you have any information around the potential operating models for and costs of establishing and maintaining an alternative indemnity fund?

We have little to add to the SRA's analysis. This points inexorably and clearly to the fact that whether or not the seemingly disproportionate costs of operating SIF can be addressed, the mutual fund operated by SIF remains the best option for profession wide cover the only other suggested alternatives that we can think of would be extending the MTC's, stimulating and establishing a voluntary market or establishing a master policy. The protection for clients is affordable, in the best interests of the consumer, desired by the profession and one where reputational damage would be suffered if even one client were left uncompensated for loss caused by a solicitor.

Question 10

Do you have views on our analysis in relation to options for regulatory arrangements and for targeted ongoing provision of PSYROC?

Question 11

If you consider that there should be regulatory arrangements for PSYROC on an ongoing basis, do you think that this should be targeted? If so on what basis? Do you have any information relevant to our consideration of whether any arrangements for ongoing PSYROC should be targeted?

We do not have enough claims data to answer these questions on an informed basis. If the SRA were to publish data for all claims by type and size of firm and premium spend (both for firms in run off and continuing practices) then we may be able to give the SRA an answer to these questions- it would help our members with risk analysis too. Participating Insurers have this data and we call on the SRA to make them disclose it

However, it seems to us that there may be scope for an imaginative scheme that did not require PSYROC to be maintained to MTC levels e.g. there could be tariff limits, claims could be limited to private individuals or SMEs or work types.

It seems to us also that the SRA could permit greater flexibility to solicitors in their terms and conditions. Currently the SRA greatly restrict the ability of solicitors to do that but if it

came out with a view that such limitations were proportionate and reasonable in the context of historic claims then solicitors could exclude such claims contractually.

However, unless the SRA collects and publishes annual premium and claim data it is inviting the profession to guess at questions were the insurance market knows the answers.

Overview

We strongly request that the SRA maintains the Solicitors Indemnity Fund limited and the protection it affords to consumers.

We believe that the cost of doing so is a small cost to the profession and one which safeguards and reinforces the trust which consumers put in the profession. We have found not one solicitor nor any firm who balks at the projected annual ongoing costs of doing so.

Nottinghamshire Law Society

14th February 2022