

Discussion paper

3 August 2022

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

- This discussion paper ends on **31 August 2022**

Introduction

This paper is an update for stakeholders on our work on future options to protect consumers who suffer loss from the negligence of a solicitor, but cannot claim under the law firm's indemnity insurance because the firm has been closed for more than six years with no successor. These 'post six-year negligence' losses are currently covered by the Solicitors Indemnity Fund (SIF) which had been due to close to new claims in September 2022.

Background

We announced [<https://www.sra.org.uk/sra/news/press/2022-press-releases/solicitors-indemnity-fund-extended/>] in April 2022 that in the light of responses to our 2021-22 consultation [<https://www.sra.org.uk/sra/consultations/consultation-listing/solicitors-indemnity-fund/>] on the future of post six-year run off cover for negligence, the SRA Board had decided to seek an extension to allow new post six year claims to the SIF until September 2023. The Board had recognised the strong feedback in consultation that consumer protection in this area should not be removed, but was concerned that the current cost of providing the cover is higher than it should be. The Board therefore wished to explore further the options for proportionate consumer protection.

Since April we have worked with the Law Society and other stakeholders to test further the case for retaining consumer protection for post six-year negligence, and the scope to do so at a proportionate cost. On 4 July 2022 we announced [<https://www.sra.org.uk/sra/news/press/2022-press-releases/sif-extension-july-2022/>] that to enable continued SIF cover until September 2023, our Board has agreed to underwrite the potential liabilities of SIF Limited to a maximum of £6m. In the unlikely event that this undertaking is called upon, we will recoup these funds through an Indemnity Contribution from the profession. This agreement does not set any precedent for the future of post six-year cover or the SIF.

In July 2022 the SRA Board had an informal discussion about the ongoing work on future consumer protection for post six-year negligence. This provided an opportunity to update the Board on work that had been

commissioned from Willis Towers Watson and hear about some of the possible options for delivering equivalent consumer protections in the future. As this was not a formal Board meeting, the Board took no decision. The Board expects to decide on any future arrangements for post six-year negligence when it meets in September 2022. We will then hold a full consultation as necessary on any next steps.

Ahead of the September Board meeting, we are publishing this paper to update stakeholders on the options we are considering, and to invite initial feedback. Responses should be emailed to us [<https://www.sra.org.uk/contactus>] by 31 August 2022.

Case for future consumer protection

The responses to our 2021-22 consultation:

- highlighted concerns that closing the SIF to new post six-year claims and making no alternative regulatory arrangements could have a greater impact on consumer protection than was suggested in our initial consultation analysis, because of the significant consequences that losses can have on the small number of individual consumers affected
- indicated that in the view of respondents the legal profession would be willing to fund the cost of ongoing consumer protection via a levy, and would not expect this cost to be passed on to consumers of legal services generally.

Since the 2021/22 consultation we have reviewed our initial analysis in the light of other available evidence about potential consumer detriment, including consumer research commissioned by us and others. We have also engaged with the Legal Services Consumer Panel and with representative bodies whose members work in fields that are particularly susceptible to long-tail claims for negligence by solicitors, such as conveyancing, probate and personal injury, to seek further evidence of the impact that such cases can have on individual consumers.

This work has identified some evidence to support the concerns raised in consultation. This includes illustrations of the impact that loss from post six-year negligence can have on some consumers, depending on their individual circumstances, and assessments that the level of such losses may change over time because of developments in the market and society more widely.

Overall, the further work done since the end of the consultation confirms that negligence emerging more than six years after the closure of a firm poses material risks to a small number of consumers. Meanwhile, our ongoing work on protecting consumers against these risks, summarised

later in this paper, has identified options that are likely to be significantly more cost effective and proportionate than the current form of the SIF.

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.

Options for providing future consumer protection

We are currently scoping out options for delivering future protection for post six-year negligence in an efficient, effective and proportionate way, with input from SIF Limited and other stakeholders and with expert consultancy from Willis Towers Watson (WTW).

The options we are considering include retaining the SIF with changes to reduce operating costs, and replacing the SIF with a new consumer protection arrangement within the SRA. We have powers to set up a new SRA consumer protection arrangement as an indemnity scheme or a compensation fund. All of these options could provide broadly the same consumer protection as the SIF.

We are still exploring the costs and funding requirements of these options. At this point our view is that a new SRA arrangement is likely to be more cost-effective on an ongoing basis than retaining the SIF, and should be able to provide broadly the same consumer protection as the SIF at a cost proportionate to the benefits of the protection provided.

Any further consultation would include an assessment of the likely costs and levy funding requirements of any preferred option. It 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.

Other issues

Further consultation may also set out proposals on the detail of the rules governing any ongoing regulatory arrangement for post six-year negligence. We are currently considering several issues on which we welcome initial stakeholder views in response to this paper.

Protection for large corporate claimants

The SIF accepts claims from any claimant who can establish a qualifying loss. However, the current SRA Compensation Fund (which covers consumer losses caused by ethical failure of solicitors such as misuse of client funds, and uninsured losses) does not accept claims from business, charities or trusts with annual turnover / income / assets of £2m or more. A new consumer protection arrangement for post six-year negligence could adopt a similar approach. We are seeking data from the SIF on the historic proportion of claims involving large corporate clients, to help us understand the likely impact of such an approach in terms of cost savings and potential consumer detriment.

Claimant costs

The SIF covers costs involved in establishing a claim, and such costs appear to represent around 20% of the total value of claims paid; we are seeking more data about what these costs involve. The SRA Compensation Fund does not cover claimant costs since claims are generally straightforward to establish, with most following SRA intervention in a firm. We intend to explore whether a new consumer protection arrangement could handle claims in a way that reduces costs for all involved, without causing detriment to consumers.

Recovering claim payments

Professional indemnity insurance (PII) and other insurance policies generally include an excess payable by the policy holder as a contribution to the cost of the claim, to encourage good risk management and reflect the 'polluter pays' principle. Where the SIF pays a claim it can seek to recover costs from the solicitor up to the level of the excess in the preceding PII policy, and does so where it considers it feasible, but the SIF has not been able to provide data on the costs and benefits of doing this. The Compensation Fund has the ability to bring subrogated claims against solicitors to recover claim payments, and does so for claims relating to ethical failures but has never done so for an uninsured claim.

We intend to explore further the policy implications and likely financial impact of these recovery powers. We would not expect a new consumer protection arrangement to use recovery powers that could cause detriment to consumers so, for instance, any excess payment would only be pursued after the consumer's claim had been met in full.

Your feedback

As set out above, we welcome any views you may have in response to the issues highlighted in this paper.

You can let us know your view by contacting us [<https://www.sra.org.uk/contactus>] by 31 August 2022.

Next steps

We will be approaching key representative bodies and other stakeholders directly to discuss the paper.

We will publish a further update on consumer protection for post six-year negligence in September 2022 after the SRA Board meeting