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SOLICITORS

The Future of Solicitors Indemnity Fund

The Solicitors Regulation Authority (SRA) has issued a further consultation paper, *Consumer protection for post six-year negligence*, in its long-running campaign to replace Solicitors Indemnity Fund (SIF), which provides indemnity to solicitors and their staff after expiry of the compulsory six years' runoff under the SRA Minimum Terms and Conditions.

Should the SRA take SIF in-house?

The good news is that the SRA now accepts that the appropriate solution is an indemnity fund rather than a discretionary compensation fund; previous proposals for the latter contained in its discussion paper dated 3 August 2022 would not have provided protection for solicitors and their staff, and would have provided inadequate protection for claimants. The SRA's acceptance of this fundamental principle is welcome.

However, the SRA's proposal is predicated on savings of £300,000 - £400,000 to be made by taking the arrangements in-house. The way in which the consultation questions are framed indicates that the SRA has already decided to do this: they ask only about the draft rules for implementation of the transfer, and the draft regulatory and equality impact assessments.

We believe the underlying analysis is flawed and the anticipated savings, on which the decision is predicated, are unlikely to be achieved for the following reasons.

1. The anticipated savings are based upon a comparison with the costs of the Assigned Risks Pool (ARP), which provided cover for firms unable to obtain insurance in the open market. That 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, or pursued by litigants in person where much of the costs burden falls on those defending claims. A simple comparison of the proportion of defence costs to claims payments between the ARP and SIF is therefore fundamentally flawed.

   It is always possible, if undesirable, to adjust the balance by paying claims for which there is a good defence available rather than defending them. As the previous Willis report noted, '…costs must be viewed in the context of value-add as there can be false economies if processes become inferior in quality because of cost-cutting which can lead to increases in claim costs for example'.

2. The costs savings are predicated on claims being handled by the SRA's Client Protection Team. This Team's expertise is in the administration of a rules-based Compensation Fund; defending professional liability claims involves a very different skillset acquired through years of experience which will require recruitment and ongoing cost, yet the Willis report on which the SRA's proposals are predicated envisages the SRA utilising or reallocating existing resources.

3. The Willis report assumes that a fixed fee arrangement might replace the current panel hourly rates. We believe there is little prospect of securing any saving in this way, particularly given the recommendation for a review in the next two to three years.

4. The proposal envisages development of a management information reporting suite; there have been a number of occasions on which the SRA's IT systems have not been among its core strengths.

5. The Willis report is replete with warnings and exclusions from its scope. It repeatedly emphasises that '[the] analysis in this report has been limited by the data available to the project team within the review timeframe and therefore high level assumptions and estimates have been made in these areas, which have high levels of uncertainty'; factors excluded from the review included handling of residual liabilities, pre-2000 firm closures and existing notified claims. These cast grave doubt on whether the report should, without more, form the basis for the SRA's decision, clearly already made, to bring this in-house.

Further information

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6. After the demise of a large number of insurers which entered the market without experience of solicitors' professional indemnity risks, including Alpha, Balva, Elite, Enterprise, ERIC, Lemma and Quinn among others, all of which became insolvent, the SRA should be cautious about assuming similar risks.

Our concern is that the cost of this decision will escalate in years to come, and provoke a renewed debate on the sustainability of cover, despite the need having been established earlier in the consultation process. This would be regrettable, when the current regime has been sustained for two decades without additional funding, despite the use of substantial funds for the extraneous purposes of the Law Society's pension fund, which received two payments totalling £50m in 2005 and 2006 and further substantial sums in later years.

We also have three further concerns which relate to the proposed changes to the SRA Indemnity Fund Rules. At present, those entitled to cover provide SIF with information to assist in their defence in confidence. When panel solicitors are instructed, legal professional privilege applies; as the SRA has often stated and asserted in legal proceedings, legal professional privilege is a fundamental human right.

There are provisions enabling SIF to provide information and documents to the Law Society (and by extension the SRA) relating to fraud, dishonesty or inadequate professional services, and certain other specified exceptions. Under the proposed regime, all information will be provided directly to the SRA as regulator. This may inhibit full and free discussion on the defence of claims.

Secondly, the draft rules contain provision for any dispute over the defence of a claim or cover as follows –

> 'The person and the SRA shall endeavour to agree to a suitable arbitrator. In the event the person and the SRA cannot agree a choice of arbitrator, then an *authorised decision maker* shall appoint an arbitrator to make a final and determination on the dispute.'

The SRA Glossary contains this definition –

> *authorised decision maker*
>
> in relation to a decision, means a person authorised to make that decision by the SRA under a schedule of delegation

The SRA, as a corporate entity, can only ever make decisions through an authorised individual. So if the SRA and the person concerned cannot agree, the SRA will make the decision anyway. It would be perfectly reasonable to provide, as is common, that the arbitrator shall instead be appointed by a third party, whether the Law Society or otherwise.

Thirdly, under the draft rules notification of a claim or circumstances must be made in a prescribed form, though no draft is provided. Draft rule 6.5 appears to impose a retrospective requirement for use of the prescribed form which cannot be right. In any event, notifications may be made by solicitors and their staff, or even claimants, who are elderly or under a disability. Barriers should not be put in the way through an over-rigid notification process.

The deadline for submission of responses is 3 January 2023. For the reasons explained above, responses should not in our view be confined to the two questions posed by the SRA, but the more fundamental question of whether the decision to bring the indemnity fund in-house is warranted. All the substantial financial risks and other issues which we have identified could be addressed by the simple expedient of leaving matters as they are.

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