



*Statement to Council on 19 May 2021 by Nick Gurney-Champion, chair of the Professional Indemnity Insurance Committee.*

### **The Solicitors Indemnity Fund (SIF)**

I'm going to open these discussions with a short statement, and I'm going to cover the following aspects.

- The history of where we are including correcting some commonly held myths.
- The regulatory constraints that the Law Society has to work within.
- What the Law Society has been doing over the last 18 months.
- Challenges and communications
- What we are trying to achieve
- What Council members can do to help.

#### ***History and correcting commonly held myths***

SIF was formed in 1987 and provided PI for solicitors through a mutual fund. In the late 1990s, many firms believed the SIF premiums were far too high and the larger firms were subsidising smaller firms. It was believed that an open market solution would be far cheaper for the profession. A ballot of the profession took place and the profession voted to bring it to a close and obtain PII on the open market.

As a result of this decision by the profession, SIF was put into runoff and closed to new entrants in September 2000. Those firms that had closed prior to September 2000 were told that they would continue to be covered by SIF indefinitely and that remains the position. Firms that closed prior to September 2000 remain covered by SIF; and that will continue even if the SRA proceeds with its intention to close it in September 2021.

One of the misconceptions that has been going around is that all firms have been assured by the Law Society or others that they will be covered by SIF indefinitely. That assurance has never been given apart from for those firms that closed prior to September 2000.

By 2004 SIF had built up considerable reserves. It was recognized that SIF had far more reserves than were needed to deal with the claims of those firms which closed pre-September 2000.

So, in 2004 the Society decided that some of those funds would be used to provide post 6-year cover for the firms which closed post 2000 without a successor practice.

At that time it was decided that this additional cover would continue for claims notified prior to September 2017.

It was when the Law Society set up this post six-year run off cover by SIF that it was envisaged at that time it would close in September 2017.

### ***Regulatory constraints***

Now in 2007 we have the Legal Services Act and the creation of the SRA and separation of representative and regulatory functions. The internal governance rules were born. From 2007 the SRA have had the exclusive jurisdiction to deal with the regulation of solicitors to the exclusion of the Law Society.

The Legal Services Act defines regulatory functions as including indemnification arrangements. SIF falls within the definition of indemnification arrangements.

The IGRs required the Law Society to delegate regulatory functions, which includes indemnification arrangements, to the SRA. Therefore, by virtue of the Solicitors Act, the Legal Services Act and the IGRs, the SRA have exclusive jurisdiction to decide on the continuation of or the closure of SIF. The Law Society cannot make that decision. Furthermore, even though the SRA have made a decision that post six year run off cover is not a regulatory requirement and not required for client protection, because of the constraints upon the Law Society by the Legal Services Act and the IGRs, the Law Society as the representative body are not allowed to fill the gap caused by the closure of SIF.

This is the reality that we have to work under and unfortunately a lot of people have not fully understood the constraints that the Law Society is under.

Following a request by the Law Society in 2013, the SRA agreed to extend the closure of SIF until September 2020. You will recall that when the Law Society set up this additional SIF cover it was due to close in September 2017. In 2016, the Law Society again invited the SRA to extend the closure of SIF until September 2023. The SRA declined to do so.

### ***What has the Law Society been doing over the last 18 months?***

I took over as chair of the PII Committee two and a half years ago. Since then I have had the potential closure of SIF as top of the committee's agenda. For the last 18 months to two years, myself and staff members from policy and the commercial teams have been in discussion with brokers, underwriters and insurers to see if there was any appetite for a market solution to fill the gap caused by the closure of SIF. I've probably had in excess of 30 meetings over that period, and these meetings are ongoing.

Although some encouraging noises were made by a few brokers, as we got closer to the September 2020 deadline it became clear that there was little if any appetite for a commercial SIF replacement.

I made my concerns on this known to the Chief Executive and the chair of the Board, and in early 2020 the SIF Working Group was set up to address this issue. It consists of Paul Tennant, Robert Bourns, Michael Garson, Lubna Shuja (who was at the time Chair of MCC and is now Vice President), Pieter de Waal and myself as chair of PIIC and also in attendance was the policy officer of the PIIC and Anika Patel from the commercial team.

We have met regularly over the last 18 months and more so in recent months. In about April or May of last year, the Working Group agreed that from the evidence we had obtained a SIF replacement in the market was not going to happen, and with COVID in full force, the ability of our retired members to obtain alternative cover caused by the closure of SIF was going to be impossible. Therefore, a further request was made to the SRA to extend the closure of SIF for a further three years. The SRA board considered this request and, I think reluctantly, agreed to extend it for a further year until September 2021.

The reasoning behind their only granting a one-year extension was that they believed a further extension beyond one year was unaffordable. I dispute that. We can come to that later.

Over the last 12 months ongoing discussion have taken place with brokers and insurers to try and find some solution which the market could offer and which the Law Society could endorse and recommend to its members. Those discussions are ongoing. Some interesting and possibly helpful suggestions have been made. It is too early to say whether those discussions will provide any workable solution. The PI market at the moment and the Covid situation have very much hindered progress, but I remain hopeful.

In tandem with this, the SIF Working Group decided to take advice from leading counsel as to the Law Society's position under the Legal Services Act and the IGRs . We wanted clarity on what we could do within the rules and what we could or could not force the SRA to do, not only with keeping SIF open but also with regard to the SIF surplus

Leading counsel confirmed:

1. That the Law Society itself carrying out indemnification arrangements for its members is a nonstarter.
2. That the decisions as to SIF Closure are the sole domain of the SRA
3. That in exercising its regulatory functions, the SRA must act within the statutory duties of the Legal Services Act. They must act in a way which is

compatible with the regulatory objectives and they must act reasonably and rationally.

In March of this year, the Law Society wrote to the SRA asking them to fully explain, in accordance with the requirements of the Legal Services Act, why they have made the decision to close SIF. The SRA responded in early May and failed to deal with the specific questions. The Society wrote again in forceful terms, asking them to properly and fully answer questions and to give detailed reasons for their decision and we understand this is to be considered by the SRA Board at its meeting on the 8th of June. They have specifically been asked to delay closure of SIF.

In addition to this, approximately 2 months ago Pieter de Waal, Simon Thomson (Law Society's policy adviser) and myself had a meeting with the LSB consumer panel to appraise them of the imminent closure of the SIF. They were horrified, as would be expected, and indicated they would raise this with the LSB and with the SRA. A few weeks ago, Stephanie, our President, had a follow up meeting with the LSB Consumer Panel, as a result of which I know that a joint letter has been prepared and is shortly to be sent to the SRA setting out our joint concerns for consumers and for members and requesting the closure of SIF be put on hold.

In recent weeks high level conversations have been taking place with the LSB who are now taking an active interest in our concerns and a three-way meeting between the LSB, the SRA and the TLS has been set up for the 26th of May.

### ***Communications and challenges***

I and others within the Law Society have had meetings with interested groups to appraise them of what is going on around SIF and on a possible replacement. The publicity through the Gazette and direct communications with local law societies has been on going over the last 12-18 months but has considerably ramped up over the last few months.

One of the challenges we have is making direct contact with retired members. Sadly neither the Law Society nor the SRA have data for our membership going back more than about six or seven years. Trying to make contact with firms and members who closed down since 2000 has been extremely challenging.

### ***What are we trying to achieve ?***

- First, we are putting substantial efforts into persuading the SRA to extend the SIF closure date. The recent letters have been designed to assist with a potential formal referral to the LSB if the SRA do not do what we want and a possible judicial review if the LSB endorse a decision to close SIF.
- Secondly, we are putting substantial efforts into trying to find a market solution to fill the gap if SIF does close.

- Third, we are ramping up the communications to members and retired members.

Unfortunately we are unable to offer solutions at this time. I am hopeful that there will be one or more solution that we will be able to offer to our members, but unfortunately at this time those are not certain enough or in detail enough to be made public.

***What Council members can do to assist?***

First, assist with getting the message out, especially to retired members, possibly through your local law societies or through other contacts you have with retired member groups.

Secondly, clarify the many misconceptions that are flying around. This is not a decision being made by the Law Society. It is only a decision that can be made by the SRA.

Thirdly, encourage members to write to the SRA and the LSB expressing their concerns with the closure of SIF, particularly as a client protection issue rather than the protection of solicitors, though that is important as well.

I hope that clarifies where we are and why we are here and what we're trying to achieve.