



## **Bar Council response to the Solicitors' Regulation Authority 'Protecting the users of legal services: balancing cost and access to legal services'**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Solicitors' Regulation Authority consultation paper entitled "Protecting the users of legal services: balancing cost and access to legal services".<sup>1</sup>
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)

**Question 1: To what extent do you think the proposed changes to our PII requirements provide an appropriate minimum level of cover for a regulated law firm?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree

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<sup>1</sup> Solicitors' Regulation Authority, "[Protecting the users of legal services: balancing cost and access to legal services](#)" (2018)

- Strongly disagree [X]

### **Level of cover**

4. The proposal is to reduce the minimum level of cover required for each claim to £500,000 (or £1m for firms providing conveyancing services). This figure has been reached on the basis that the SRA's research shows that 98% of claims fall under the £500,000 level (p. 16 of the consultation paper). In fact, these conclusions appear to have been reached on the basis of data from about only 74% of the insurance market over the period 2004-2014. We consider that this data is both too limited and too old, for the following reasons:

- a) No information is available about which insurers did not contribute their data and the likely claims experience of those insurers. Although we note that, according to Economics, Policy and Competition ('EPC') who has been commissioned by the Solicitors Regulation Authority to look into professional indemnity insurance requirements, the insurers whose data was excluded focused on small firms, there is no information about the type of work they were undertaking or their likely claims history. The firms may have been at the "risky" end of the market (e.g. small conveyancing firms). It appears that the 26% of the market that did not respond paid a total of over £400m of claims in the relevant period;
- b) The claims have been adjusted by RPI only, without any analysis of whether this accurately reflects the inflation that has been experienced in claim size since 2016. There are many factors other than RPI which can increase claims sizes over a period, one example being the emergence of a new type of claim, such as "cyber fraud" thefts in conveyancing claims. This is a key example of a large type of claim which did not exist until recently and which we consider demonstrates a serious risk that the SRA analysis understates the number of claims that would exceed the new proposed cap.

5. Furthermore, there does not appear to be any analysis of the aggregation provisions that applied to the claims included in the SRA's information about claim size from 74% of insurers. In our experience, aggregation of claims is not uncommon in solicitors' liability insurance, particularly in relation to misappropriation of client funds or conveyancing frauds. Where claims are aggregated and exceed the level of cover this can have a significant negative impact on both consumers and solicitors alike.

6. In addition, the figures do not cater for defence costs. We note and comment on the proposal to have firms bear a larger proportion of defence costs below. However, from the insurers' perspective, defence costs can be a very significant part

of their outlay on a claim, as demonstrated by the fact that in the relevant period £1.6bn was paid out in claims and £400m in defence costs (i.e. defence costs add another 25% to the total amount paid out).

7. We therefore consider it likely that the SRA research underestimates the number of claims that would breach the levels of either £500,000 or £1 million, and along with that the risk of harm to consumers, and damage to the reputation of the solicitors' profession. It also fails to cater for the type of case that may well breach the £500,000 limit and the effect on the solicitors' clients. For instance, claims for catastrophic injuries (where a claimant has lost the ability to work) are likely to exceed this level of cover. If such a claim is negligently handled by a solicitor, the impact on the client (and the reputation of the solicitors' profession if there is inadequate insurance) would be very harmful.

### **Projected benefits of reducing the minimum level of cover**

8. The research to support the conclusion that there is likely to be a reduction in premium cost is particularly scant. Neither the SRA consultation paper nor the EPC research reveals how many insurers or insurance brokers responded to requests for indications of likely premium level. The presentation of the information that does exist suggests that it is largely anecdotal or vague. The only figures referred to in the EPC report are an indication from one broker that an extra £1m of cover for solicitors' costs £600 to £1,000 for a small firm. There is no explanation of whether this extra £1m layer is in excess of the first £500,000, £1m or another figure. Nor is there any analysis of price changes in the market when minimum insurance levels were increased in 2005/2006 (or indeed the reasons why the increase was thought to be sensible at that stage). However, the indication given by one broker is used to provide the basis for concluding that there might be a 5-10% price reduction for a solicitor paying around £8,800 in PI premiums. A 5-10% reduction would mean an annual saving of between £440 and £880 and we take the view that these figures are likely to be overstated even in view of the anecdotal evidence about the cost of an additional £1m cover.

9. We are not convinced that reducing cover from £1m to £500,000 would lead to price reductions in the order hoped by the SRA. The first £500,000 is by far the most "risky" layer for an insurer. It is a non sequitur for the SRA to conclude on the one hand that very few claims will be affected by reducing the minimum level of cover to £500,000 and to suggest on the other that there may be noticeable premium reductions.

10. If solicitors are only required to have £500,000 of cover and it becomes less common to take out excess layer cover, this may hit overall profitability of insurance companies and either increase the costs of the primary layer or cause insurers to pull out of the market.

11. We take the view that the savings generated by reducing cover levels to £500,000 will not be sufficient to justify increasing the risk of consumers going uncompensated by the solicitors' profession. Further, the likely savings are so small that they are unlikely to make an appreciable difference to the costs of buying legal advice from a consumer's perspective. The changes are therefore unlikely to prompt further competition (and indeed may reduce it, because cautious clients will concentrate their legal work in large firms whom they assume will not be insuring at minimal levels).

12. We are not convinced that small changes to the costs of cover will stop firms from experiencing difficulties with renewal. It is more likely that these changes will lead to firms failing after a large claim, rather than as a result of being insufficiently prepared for a large claim.

### **Flexible defence costs cover**

13. The proposal is that larger elements of defence costs cover would be included in firms' excess arrangements, in the hope that firms will take a more settlement minded approach to the costs incurred in defending claims.

14. There is no evidence at all to support the proposition that firms are incurring high defence costs because those costs are insured, or that greater scope for including defence costs in their excess would incentivise them to settle. It is our experience that large excesses can become an impediment in terms of handling professional liability claims because insureds stand in the way of costs being properly incurred to defend their claims. Further, increased excesses do not always remove overall costs from firms. They reduce insurance premiums but greatly increase the costs of responding to claims when they are suffered. Large excesses can cause serious cashflow difficulties in small firms and will increase the risk of firms failing.

15. We also have concerns that including large elements of defence costs in firms' excesses would lead to more firms wanting to handle the claims brought against them themselves, thereby missing out on the benefit of objective and expert advice.

### **Question 2: To what extent do you agree that our minimum PII requirements do not need to include cover for financial institutions and other large business clients?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

## Sophistication

16. The proposal is for the MTCs to exclude cover for liability to a client if the client's turnover in "the most recent financial year" exceeds £2 million. Firms would be permitted to make insurance arrangements for these clients "on significantly more flexible terms" (p.34 of the consultation paper). The justification for distinguishing these business clients from other clients is that they are regarded as "large business clients" who are "more sophisticated and should be able to assure themselves about the adequacy of insurance arrangements relating to legal services they purchase" (p.34 of the consultation paper).

17. We disagree with the characterisation of all commercial clients with turnover above £2 million as "large" and as sufficiently "sophisticated". We are not aware of any other generally accepted classification of business size which sets the qualifying threshold for a "large" business at this exceptionally low level. By contrast, the widely-used EU definition of SMEs (Recommendation 2003/361/EC) classifies businesses as Micro (with turnover of less than €2 million), Small (with turnover between €2 million and €10 million) and Medium-sized (with turnover between €10 million and €50 million). The UK Companies Act 2006 uses the same size classifications, with different turnover thresholds: Micro, with turnover not more than £632,000; Small, with turnover not more than £10.2 million; and Medium-sized, with turnover not more than £36 million.

18. We believe that these widely-used classifications convey the generally accepted understanding of what constitutes small, medium-sized and large businesses. We consider that establishing firms' PII requirements on the basis that business clients which would generally be regarded as "small" should instead be treated as large and sophisticated is unreasonable and wrong in principle. Whilst many medium-sized and all large businesses (properly so-called) might be expected to have, or have the resources to acquire, the necessary sophistication to assess their legal advisers' PII arrangements (subject to the important point about 'claims made' cover addressed under the next heading below), we do not think the same can generally be said of businesses falling within the Companies Act 2006 classification of a "small" business.

19. We also believe that turnover provides an arbitrary and unreliable guide to a business's sophistication in PII matters. An architecture practice with turnover of £2.5 million and experience of buying its own PII cover is likely to have a very different level of PII-relevant sophistication from a small manufacturing company with the same turnover and no experience of buying PII cover.

20. Paragraphs 32-33 of the consultation paper identify "better information" as a way of mitigating the risk of selecting a firm without appropriate PII cover (similar

points are made in paragraphs 80 and 85 of the Initial Impact Assessment). We cannot comment in detail without knowing more about the nature of the information referred to, but we question whether many small businesses (in the Companies Act sense) will have the ability to conduct an adequate assessment of this information – and, in any event, it is unclear how such information could resolve the issue about “claims made” cover addressed under the next heading.

### **“Claims made” cover**

21. We believe there is a further flaw in the assumption that business clients will be able to make an accurate assessment of the adequacy of a firm’s PII cover – one which derives from the “claims made” nature of PII cover. This concern applies to business clients of any size, but is likely to have a particular impact on smaller businesses giving instructions under a one-off retainer.

22. Because PII cover is written on a “claims made” basis, what matters to the client is not just whether the firm has adequate cover at the time of the instruction, but also (and particularly) that the cover remains adequate at the time when a claim is first made or circumstances are first notified – because it is the policy in force at this time which will be called upon to respond. Given the time it takes for claims to develop (often years after the date of the instruction), in many cases the relevant PII policy will not be the one in force at the date of the instruction, but rather a later policy which may be on different, less favourable terms.

23. Accordingly, even if a business client is able to make a reliable assessment of the scope of a firm’s PII cover when instructing the firm, it cannot know whether the firm will maintain cover on the same terms in the future. This appears to us to significantly undermine the principal justification for the proposed exclusion in respect of clients with turnover above £2 million (i.e. that they “should be able to assure themselves about the adequacy of insurance arrangements relating to legal services they purchase”).

### **Burden & reduction in competition**

24. The intended effect of the exclusion is to place the burden of checking the adequacy of firms’ PII cover on the client. For the reasons already given under the first and second headings above, we believe this is unrealistic: most businesses do not have the resources to obtain and conduct comparisons of the PII terms of the firms they are considering instructing, nor will it always be practical to do so (for example, where speed is required), and in any event such checks would not address the ‘claims made’ issue. But even setting aside these practical objections, we believe the proposal is flawed because it will reduce competition and increase barriers to firms entering this sector of the market.

25. As is recognised in the consultation paper and the IIA, larger business clients are likely to instruct fewer firms as result in order to control the cost of checking the level and scope of cover. More generally, we believe many businesses will be discouraged from considering changing their legal services supplier(s), given the cost of undertaking checks on new firms, and the risks of getting it wrong. We anticipate that businesses will also be disincentivised from instructing smaller and newer firms: it is likely that caution will dictate that checks on the PII cover of such firms are more rigorous and therefore more costly. The consequence is likely to be that larger, more established firms will attract a greater share of commercial work than they do already, reducing competition and making entry to the market in this field more difficult.

26. Firms will also face the risk that, faced with a claim or notification of circumstances, their PI insurers may dispute whether a business client falls outside the exclusion (i.e. has a turnover of less than £2 million). We suspect that, to address this risk, better-managed and more responsible small firms will end up buying additional cover 'just in case'. The proposed exclusion may therefore have the effect of increasing the insurance costs of the kind of small firm which ought to be encouraged, not discouraged, from practising in the commercial sector.

### **Underwriting and cross-subsidisation**

27. The proposal to exclude liability to business clients with turnover above £2 million appears to be founded on a belief that the cost of obtaining PII cover for firms providing services to such clients is currently being cross-subsidised by firms which practise exclusively in other, lower-risk sectors of the market.

28. We question whether this belief is accurate: no justification is given for it in the consultation paper. In our experience, underwriters rate premium according to the type of business undertaken by the firm – firms with a greater weighting of business in higher-risk sectors, will pay higher rates of premium than firms practising wholly or predominantly in lower-risk sectors. If this is correct, then it is unclear whether introducing the proposed exclusion would have any significant impact on the premium paid by firms practising in lower risk fields. We believe this issue merits further investigation.

### **Inter-relationship between the exclusion and the proposed Indemnity Insurance Rules**

29. Rule 9.1 of the proposed IIR requires firms and principals to supply a claimant with the insurance information identified in the rule. However, the rule only applies in respect of a claim which "relates to any matter within the scope of cover of the MTC". Since liability to clients with turnover above £2 million would be excluded

from cover under the MTC, it appears that, as currently drafted, Rule 9.1 would deprive such clients of the right to Rule 9.1 information. We can see no justification for this and assume it is an unintended consequence.

30. Rule 2.2 of the proposed IIR would oblige any firm which provides conveyancing services to obtain the extension of cover for such services. However, a firm which provides conveyancing services to commercial clients with turnover above £2 million would obtain no benefit from the extension of cover (save to the extent it also provides such services to clients below the £2 million threshold) and would require alternative cover for its conveyancing activities. We assume that this is an intended consequence, but we flag it as a potential trap for the unwary firm which believes that by buying the extension it has done all that is required, without taking into account the impact of the exclusion.

### **Comments on the definition of “Turnover”**

31. “Turnover” is defined in the Glossary as “the amounts derived from the provision of goods and services in the most recent financial year, after deduction of (A) trade discounts, (B) value added tax, and (C) any other taxes based on the amounts so derived”.

32. We believe that there are a number of potential problems with this definition:

- (a) “goods and services” Further thought may need to be given to the description of the commercial operations from which turnover is derived. We assume that the description “goods and services” is intended to cover all types of business, but we doubt whether it does. For example, it probably does not cover businesses which receive their income from letting commercial property.
- (b) “the most recent financial year” This begs the question: “most recent” from what standpoint? The answer is not clear from the proposed MTCs or the Glossary. The logical answer would seem to be the date of instruction, but there is no indication whether this is what was intended. One interpretation of Clause 6.3, where the same phrase is used, is: “most recent” as at the date liability is ascertained. But that cannot be what was intended: by that date, it would be impossible for a firm to obtain a non-MTC policy if it did not already have one.
- (c) “trade discounts” It is unclear what purpose is served by including this. As we understand the phrase, it simply means ‘reduction from list price’. If that is what is meant, we would have thought that the impact of trade discounts is already reflected in the phrase “the amounts derived from”, and to refer to



them expressly is confusing. If something other than 'reduction from list price' is meant, we do not know what meaning was intended.

**Please provide any additional comments on the alternative option that this could be at the election of the law firm.**

33. This alternative option would not resolve the issues identified above.

**Question 3: Do you think our definition for excluding large financial institutions corporations and business client is appropriate?**

- Yes
- No [X]

34. In our view, the exclusion is inappropriate for the reasons given in response to Question 2, where we also provide our comments on the drafting of the exclusion to the extent we consider appropriate.

**Question 4: To what extent do you agree that we should introduce a separate component in our PII arrangements meaning only firms that need to have cover for conveyancing services are required to buy this cover.**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

35. Although we can see that claims against conveyancing firms have a greater risk of being large (because of property prices) it seems to us too complicated to introduce separate insurance arrangements for firms undertaking conveyancing cover.

36. Some firms include conveyancing work as a core part of their business; others carry out work that would fall within the current proposed definition of conveyancing on a more ad hoc basis (as we explain below in response to question 5). As we understand it, unless firms obtain specific conveyancing cover they would be completely uninsured in respect of work classed as conveyancing. There would therefore be a serious risk of firms having no cover for some work. Given the financial importance of conveyancing transactions to solicitors' clients (they are often the largest transaction a client will ever undertake) we are very concerned about the consumer impact of solicitors having no insurance for conveyancing.

37. The SRA does not appear to have undertaken analysis of how conveyancing risks could be more appropriately dealt with by way of adjusting risk ratings on underwriting (to the extent that this type of risk rating is not already adequately done). This would be simpler than introducing a separate conveyancing limit of cover/insurance product.

**Question 5: Do you think our proposed definition of conveyancing services is appropriate?**

- Yes
- No [X]

38. The proposed definition is too wide. It seems to us that it would or might capture services that firms who do not habitually carry out conveyancing carry out as ancillary activities, for example:

- (a) Dealing with the settlement of litigation between parties where one of the terms of the settlement is the transfer of a piece of land; or
- (b) Solicitors dealing with enforcement, particularly charging orders and orders for sale.

39. Having too broad a definition of “conveyancing” will increase the risk of coverage disputes between insurers and insureds (with the attendant uncertainty for consumers).

**Question 6: Do you think there are changes we should be making to our successor practice rules?**

- Yes [X]
- No

40. We agree that the successor practice rules are not easy to understand. As a result, there is sometimes uncertainty as to whether a firm is a successor practice within the meaning of the MTC. At present, the question of whether a firm is a successor practice is determined only after a claim has been made. A firm may be reluctant to accept that it is a successor practice after a claim has been made because it has an adverse impact on the firm’s claims history and may lead to an increase in premium. Similarly, an insurer may reject a claim on the grounds that a firm is not a successor practice. This can give rise to disputes between participating insurers or even to a gap in cover. A gap in cover may arise if there is no run-off cover, if there turns out to be no successor practice, and if the claim was notified after the end of the last period of insurance of the first practice and did not arise out of circumstances notified to insurers during any period of insurance prior to the first firm’s closure.

41. We suggest that the SRA simplify the rules and/or develop a mechanism by which a firm which closes must either purchase run-off cover from its existing insurer or obtain the agreement of another participating insurer that any claims against the first firm will be covered under the policy of another, nominated firm. The first firm would need to register with the SRA either details of its run-off policy, or the agreement with the participating insurer. The agreement would need to bind not only that insurer, but also any other participating insurer of the nominated firm in subsequent years. This would require a change to the participating insurers' agreement. As this information would be available to insurers on renewal, we believe that participating insurers would be willing to accept this means of allocation of risk because they would be able to take it into account when making their underwriting decisions.

**Question 7: Do you agree with the approach we are taking to bring the MTCs and PIA up to date?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

42. See the Responses to Questions 1, 2, 3, 4 and 5 above.

**Do you have any detailed comments on the changes we have made to the provisions in the MTCs?**

43. See the Responses to Questions 1, 2 and 5 above. In addition:

- (a) In Clause 1.1 of the proposed MTCs, we question whether the proposed references to prior practice and successor practice are adequate substitutes for the detailed provisions in Clauses 1.4 to 1.7 of the current MTC. Even if they are, we suggest you consider using the formulation "... including in connection with a prior practice and ...", rather than "...including its prior practice...".
- (b) Clause 2.1 of the proposed MTCs: see our Response to Question 5 above, which also applies to the drafting of the reference to conveyancing services ("arises from or is any way connected with") in Clause 2.1. Note too the inconsistency in language between clauses 2.1 ("*arises from* or is any way connected with") and 6.2 ("*in respect of* or in any way in connection with").

**Question 8: To what extent do you agree that the changes to our PII requirements provide law firms with more flexible options to potentially lower insurance costs?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

44. See the Responses to Questions 1 and 2 above.

**Question 9: Do you agree the proposed level for the cap on cover in run-off provides adequate protection for the users of legal services whilst balancing the need for premiums to be more affordable?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

45. The proposal put forward in the consultation paper is that, *for future periods*, run-off cover should be kept at six years but with overall caps of £3m for conveyancing claims and £1.5m for other claims. The rationale for the change is that:

- (a) Run-off cover is too expensive, which creates a barrier to retirement, which is not in the public interest;
- (b) This inability is a greater issue since those who cannot retire are often those engaged in work which generates high volumes of claims;
- (c) Insurers are obliged to provide cover even where premiums are not paid, leading to increased premia for those who do pay; and
- (d) The firms in question are often not managing closure properly, leading to increased costs of intervention, which in turn increases costs for the profession as a whole.

46. We do not agree that these proposals strike an adequate balance between users of legal services and solicitors. We reach this view for a number of reasons.

- a. First, these limits of cover compare with the annual limits of £1m for conveyancing claims and £500,000 for other claims. Thus the cap would mean that a very limited number of claims might exhaust the mandatory cover. The consultation paper recognises that this might mean that those whose claims arise later might find that they were uninsured. A phased cap would change the profile of those who made recovery as against those who did not, but would not resolve the problem.

- b. Secondly, whilst we sympathise with those practitioners who are finding it hard to retire because of the cost of run-off premia for which no provision was made during earlier years of practice, we do not believe that the current proposals are appropriate, both because they are unlikely to be efficacious and because they are inherently undesirable.
- i. First, we note that the proposal relates to future indemnity periods and not current periods. Thus, it will only be solicitors looking to retire in the future who will be impacted.
  - ii. Secondly, as the paper recognises, the actual liabilities of these solicitors will remain unaffected. The difference will be that fewer of those liabilities will be mandatorily insured. Accordingly, either retiring practitioners will have to take out voluntary insurance (which will mean, in practice, that they will have to pay the very premia which it is said are preventing them from retiring) or they will run the risk that their own assets will be at risk. Whether they will choose to retire in those circumstances is surely doubtful.
  - iii. Thirdly, in our view, if the underlying problem is that these practices are not making sufficient provision in earlier years of practice to cater for retirement liabilities, then we do not think that the solution suggested is an appropriate one. Instead, a solution based on ensuring that appropriate provision is made, via a programme of education or some form of mandatory savings fund, would be more appropriate. That would enable solicitors to retire in a timely fashion whilst protecting the users of legal services.
- c. Thirdly, the evidence base for the suggestion that premia will be substantially reduced is very exiguous. Moreover, the amount of the reduction seems in fact to be relatively small.

**Question 10: To what extent do you agree that the changes to our PII requirements could encourage new firms to enter the legal services market increasing choice for users of legal services?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

47. See the Responses to Questions 1 and 2 above.

**Question 11: Are there any positive or negative EDI impacts from the proposed changes to our PII requirements that you think we have not identified?**

- Yes
- No [X]

**Question 12: Are there any options for changes to our PII requirements that we are not proposing or have not identified that we should consider further? Please explain why and provide any evidence that supports your view.**

N/A

**Question 13: To what extent do you agree that the proposed changes to the Compensation Fund would clarify its purpose as a targeted hardship fund protecting the vulnerable that need and deserve it those in most?**

- Strongly agree
- Somewhat agree
- Neither disagree or agree
- Somewhat disagree [X]
- Strongly disagree

48. We believe that Question 13 takes as its starting point that the purpose of the Compensation Fund is to be a targeted hardship fund protecting the vulnerable who need and deserve it the most, and asking whether the proposed changes achieve this aim. We answer the question on this basis.

49. The consultation paper makes a number of proposals which are not covered by specific questions. Our response to those proposals, insofar as they impact on the reputation of the legal profession, access to justice, or barristers, is set out below.

**We disagree in principle with the proposal that there should be a means test for consumers:**

50. We do not think that imposing a means test for consumers is appropriate. The regulatory objective of 'protecting and promoting the interests of consumers' (s 1(1)(d)) applies to all consumers. A means test is not applied by the Financial Ombudsman Service or the Financial Services Compensation Scheme.

51. No data has been provided justifying the exclusion of what is described in the Initial Impact Assessment as "this small group" (at paragraph 95). The Initial Impact Assessment states (at paragraph 95) that: "Members of this small group will have to

make a judgement as to whether the service provider they select, along with the PII cover and likelihood of failure or monies going missing is right for them.” There is no indication as to what this means, or how any consumer might be expected to do this. And in instructing a solicitor, consumers are likely to think that they are already making a judgment as to whether the service provider they select, along with the PII cover and likelihood of failure or monies going missing, is right for them. Consumers choose to instruct solicitors precisely because they think it is a safe course of action. Sending the message that it may not be safe, and that consumers must make a judgment for themselves, is likely to cause significant damage to the reputation of the legal profession.

**We disagree with the proposed means test itself:**

52. Both the proposed type of means test (financial wealth (net)) and the threshold of £250,000 are likely to give rise to arbitrary and unfair results. A consumer with modest savings and income might have reached the end of a repayment mortgage and be a few years off retirement age. They might then be required to relocate for work. If they sold their house for £250,000 and were living in rented accommodation while looking for a new home, they would be ineligible to claim losses of, say, £75,000 in respect of a lost inheritance. This would be a financial loss which might cause them significant hardship. But if the same consumer had a mortgage of £50,000, reducing their financial wealth (net) below £250,000, they would be able to claim the £75,000 losses. And a consumer who owned a house valued at £1.5m with a mortgage of £750,000, and had very high income but no savings, would be eligible to claim losses of £75,000 (or indeed losses up to the proposed new maximum of £500,000).

**We disagree with the proposal that an estimate be provided with no verification unless asked:**

53. The proposal that applicants “be asked to provide an estimate of their net financial wealth” without providing verification (unless asked) is open to abuse. Careful and honest consumers are likely to find themselves ineligible to claim, while those who approach the application form less conscientiously will benefit. The aim of “minimising the additional burden/cost of processing claims” could be met more effectively by allowing all consumers to claim.

**We disagree with the proposal that the costs of making a claim be excluded:**

54. A blanket exclusion on the costs of making a claim is unfair. The suggested justification is that “We are redesigning our process and the forms we use so [as] to make it easier for vulnerable people to apply for a payment potentially assisted by friends, carers or organisations like Citizens Advice, rather than paid professionals.

Citizens Advice, for example, already help people make claims to the Criminal Injuries Compensation Scheme.”

55. Redesigning and simplifying the process and forms is welcome. But it is wrong in principle for the SRA, as the regulator of the solicitors’ profession, to use the theoretical availability of pro bono advice to justify a proposal which aims to reduce costs for the profession.

56. Applicants to the Fund have already been badly let down by solicitors. It would also be damaging for the reputation of the legal profession for consumers and small businesses and charities to be denied the costs of legal advice and assistance at this critical stage.

57. In practice, excluding all costs of making a claim will have two consequences. Firstly, the cost of making a claim will be transferred to the free advice sector in those cases where applicants are able to obtain pro bono assistance. The burden therefore shifts from the solicitors’ profession to the pro bono advice sector. This is contrary to the regulatory objectives of improving access to justice and protecting and promoting the interests of consumers.

58. Secondly, the proposal is unrealistic. Pro bono services are already unable to cope with demands for services. The Initial Impact Assessment states (at paragraph 99) that: “The data on areas of law that give rise to claims, for example, conveyancing, would suggest that applicants will have the capabilities to make a claim themselves or seek out free help. We recognise people have different levels of capability and knowledge to be able to obtain the necessary information to be able to make an application.” The data is not summarised. We are therefore unable to form a view as to whether the data set is derived from claims which have been made, either with or without pro bono assistance. If it is, the fact that people may be unable to make claims themselves and unable to obtain pro bono assistance will self-evidently not be revealed by the data, because those people will not have made claims. If claim costs are excluded entirely, many people will be unable to make a claim because they cannot find pro bono assistance.

59. The Initial Impact Assessment recognises, as set out above, that “people have different levels of capability and knowledge to be able to obtain the necessary information to be able to make an application.” But there is no indication that an equality impact assessment has been carried out in relation to a blanket exclusion on claim costs. We believe that such an assessment would conclude that a blanket exclusion on claim costs would have a disproportionate adverse impact on disabled people.



60. We accept that reducing costs is a legitimate aim. But other more proportionate means of reducing costs should be considered. For example, a cap on the legal fees which could be claimed. This would enable solicitors and barristers instructed on a public access basis to assist applicants to make a claim on the Fund in return for a fixed fee.

**We disagree with the proposal that there be a limit for claims other than a per claimant limit:**

61. The application and construction of the definition of 'one claim' in clause 2.5 of the current MTC (commonly known as an 'aggregation' clause) gives rise to difficult issues and is a source of significant disputes. Adopting any 'aggregation' provision other than a per claimant limit (i.e. that the amount paid to a single claimant in respect of a claim cannot exceed the maximum amount payable by the Fund) is likely to give rise, similarly, to difficult issues and significant disputes.

62. Specifically, the proposal that the maximum claim limit should apply per retainer is likely to give rise to arbitrary and unfair results. In some cases it will be a matter of chance whether there is a single retainer or multiple retainers. The second example on page 69 of the consultation paper illustrates this. B, C and D might be a widower and two children who inherit shares in a family company on the death of the spouse/mother. They might enter into separate retainers for the sale of the shares, or a single retainer. In the example, there are three retainers, three applications, and the Fund pays £400,000 to B and £500,000 to each of C and D. If there were a single retainer, the Fund would pay a single amount of £500,000 to B, C and D. There would then be an issue as to whether the Fund was paying this sum to B, C and D jointly, or whether it should make separate payments to each of them, and if so, in what amount.

63. Similarly, in the third example on page 69 of the consultation paper, a person (M) sells a portfolio of four properties. M is eligible for compensation of £1m because the properties are sold to four different buyers. If the properties were sold to the same buyer, there might be a single retainer, reducing M's compensation to £500,000.

64. Further, in cases where there is no written retainer, it may be necessary to resolve a factual issue as to whether there is a single retainer or more than one retainer.

**We disagree that barristers should not be eligible to claim from the Fund:**

65. We disagree that barristers should not be eligible to claim from the Fund. A barrister would need to make a claim where a client has paid fees to a solicitor, and the solicitor has not paid those fees to the barrister. Those fees are held on trust for the barrister, and they should be in the same position as any other small business whose

money has been taken by a solicitor in breach of trust. There is no justification for treating barristers differently from businesses with an income below £2m. The assumption which is implicit in this proposal is that barristers are not “the people that need the most protection” (see page 63). This is not supported by evidence. Barristers are self-employed, and we believe that the loss of fees for a sustained period of work would cause hardship in many cases. The Initial Impact Assessment (at paragraph 105) states that barristers can take steps to make sure that any monies due to them are protected by the firm and consider other avenues of redress that might be available to them. We do not know what is meant by this: barristers, like clients, should be able to assume that monies in a firm’s client account are protected by the firm; and there are no other avenues of redress where monies have been stolen.

**Our suggestions in relation to insurers’ refusals to pay a claim under an insurance policy (page 79 of the consultation paper):**

66. We suggest that the SRA include provisions in the MTC and PIA which require it to be sent decisions made in arbitrations between firms and their insurers, and between insurers under the participating insurers’ agreement. The SRA should then publish suitably anonymised summaries of those decisions (similar to the case studies published by the Financial Ombudsman Service in Ombudsman News: <http://www.financial-ombudsman.org.uk/publications/ombudsman.htm>). This would reduce the number of contested arbitrations because a body of law and practice would emerge. It would also promote consistency of decision making by arbitrators. It would also prevent insurers from proposing or agreeing to the nomination of a particular arbitrator because his or her views are known to them from a previous arbitration, but not known to the other insurer. This is unfair on firms and claimants under the Third Parties (Rights Against Insurers) Acts 1930 and 2010.

67. We do not understand the suggestion that the SRA be allowed to attend conferences with counsel/experts that examine cases where dishonesty is alleged and cover has been declined. Such a conference would be privileged and in any event the suggested purpose and/or potential result of the SRA’s involvement is unclear.

**Question 14: Are there any options for changes to how we manage the Compensation Fund that we have not identified that we should consider further?**

68. See our answer to Question 13 above.

**Question 15: To what extent do you agree that we should exclude applications from people living in wealthy households?**

- Strongly agree

- Somewhat agree
- Neither disagree or agree
- Somewhat disagree
- Strongly disagree [X]

69. See our answer to Question 13 above.

**Question 16: Do you think our proposed measure of wealth and threshold for excluding these application is appropriate?**

- Yes
- No [X]

70. See our answer to Question 13 above.

**Question 17: Do you think we should be making any other changes to eligibility and/or the circumstances where we would make a payment?**

- Yes [X]
- No

71. See our answer to Question 13 above.

**Question 18: Do you think we have set out the right approach for assessing when a maximum payment has been reached?**

- Yes
- No [X]

72. See our answer to Question 13 above.

**Question 19: Do you think the current formula remains a fair way to apportion the costs of maintaining the Compensation Fund?**

- Yes
- No

73. We do not think that it is appropriate for us to answer this question, as barristers do not contribute to these costs.

**Question 20: What steps do you think might be reasonable for someone to take to investigate a scheme/transaction before committing money to it and that it is genuine?**

74. Paragraph 126 of the consultation paper states that the proposed approach (of disallowing a claim for compensation on grounds that an applicant did not take reasonable steps to investigate a scheme/transaction and satisfy themselves that it is genuine before committing money to it), “will still recognise that some applicants will have sought legal advice ‘in good faith’ and will not know that the solicitor was either dishonest or that the firm was being used to provide credibility to dubious schemes. It also recognise[s that] some people will be vulnerable due to certain events or factors which means they may not make the best decision for their needs.”

75. It will almost never be the case that the applicant did not seek legal advice in good faith, and knew that the solicitor was dishonest or that the firm was being used to provide credibility to a dubious scheme. In those rare cases where this is so, we agree that the Fund should not pay compensation.

76. But honest people routinely invest in schemes which, to an experienced solicitor or barrister, or to a regulator, bear the hallmarks of a dishonest scheme or scam. They often invest money which they cannot afford to lose, such as a lifetime’s pension savings. Paragraph 122 of the consultation paper states that the SRA’s view is that “the small number of people who engage in such risky matters should take steps to check the legitimacy of the high return schemes and products and the solicitors’ involvement in them.” But one of the reasons that the promoters of such schemes involve solicitors in them is to give them a veneer of legitimacy and put people off their guard. To deny consumers compensation in such circumstances would in our view be inconsistent with the regulatory objective of protecting and promoting the interests of consumers (s 1(1)(d) of the Legal Services Act 2007). It would also go well beyond the suggested principles (on page 74 of the consultation paper), with which we agree, that the Fund cannot underwrite investment schemes, and that the Fund takes account of the general principle that people are responsible for their own decisions and that they must act carefully. Similarly, we think that imposing a “reasonable steps” test which requires consumers to have taken steps to “check the legitimacy of the high return schemes and products and the solicitors’ involvement in them” before they are eligible for compensation would be inconsistent with the suggested principle (at page 73 of the consultation paper) that the purpose of the Fund is to help people who need it the most when they have lost money as the result of a solicitor’s actions by replacing some or all of that money.

77. The Initial Impact Assessment refers (at paragraph 98) to the Financial Ombudsman Guidance on applications that are likely to fail because the applicant failed to mitigate their loss. This is not relevant, and does not provide support for the proposal: mitigation of loss is a principle which applies after a loss has been suffered, not before.

**Question 21: Do you think setting out clear Guiding Principles in the rules or as guidance could make the purpose and scope of the Fund and how we make decisions clearer to users of legal services and their advisors?**

- Yes [X]
- No

78. We think that this is self-evidently the case. But we think that the guidance materials would need to be more detailed in order to be useful to applicants and their advisers. See for example the “online technical resource” ([www.financial-ombudsman.org.uk/publications/technical.htm](http://www.financial-ombudsman.org.uk/publications/technical.htm)) on the Financial Ombudsman Service website. This sets out the ombudsman’s usual approach to the disputes that it sees involving financial products and services that are complained about most.

**Question 22: Are there any positive or negative EDI impacts from the proposed changes to the Compensation Fund that you do not think we have identified?**

- Yes [X]
- No

79. The Initial Impact Assessment states (at paragraph 95) that: “The introduction of the eligibility criteria to exclude application from wealthy individuals will have less impact on applicants with some protected characteristics or from BAME backgrounds because they are more likely to be on lower incomes. We have estimated that this proposal will impact the top five percent of the wealthiest households.” The data on which these statements are based is not identified or summarised in the Initial Impact Assessment or in the consultation paper. We are therefore unable to comment.

**Question 23: Can you suggest any other approaches or strategies that the SRA might adopt to prevent firms being victims of cybercrime attacks?**

80. The SRA should lobby for a change to banking practice so that it is a requirement – at least for electronic payments over a certain amount – that an account name be provided in addition to an account number and sort code, and that the bank will not make the payment unless the account name matches the number and sort code.

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