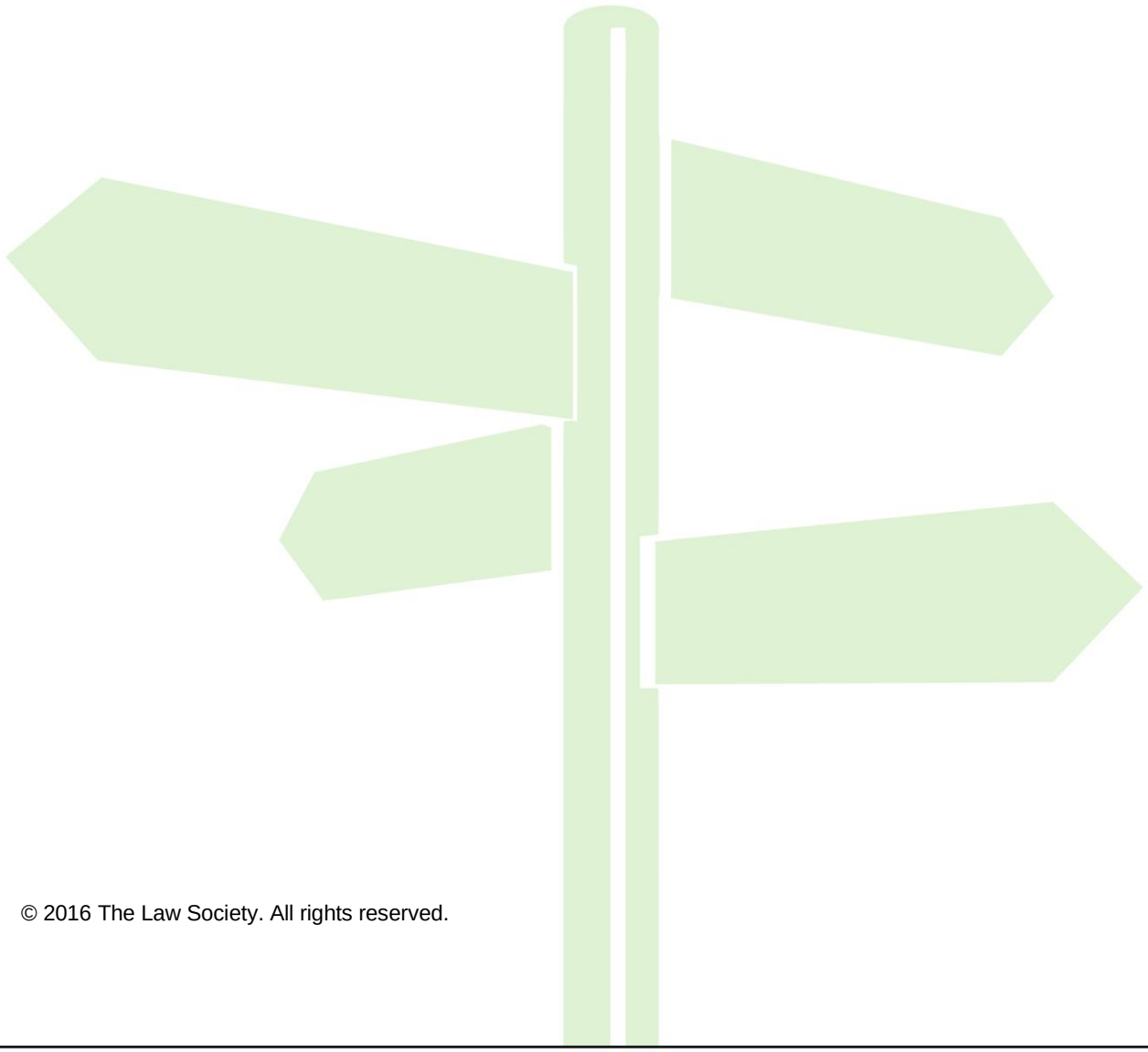
The Law Society

Protecting the users of legal services: Balancing cost and access to legal services

Junior Lawyers Division response to the SRA consultation

June 2018



The Junior Lawyers Division

Response to the SRA consultation
Protecting the users of legal services: Balancing cost and access to legal services

Introduction

This response has been prepared by Nick Gova, director of Garrick Law Limited and the Junior Lawyers Division (JLD) national committee representative of the Berks Bucks & Oxen JLD. Nick Gova attends quarterly national committee meetings held at The Law Society and therefore works with the JLD executive committee combating issues that affect junior lawyers throughout England and Wales.

Being a director of a law firm and a junior lawyer, the JLD felt that it was entirely appropriate, based on his wealth of experience, to seek the views of Nick Gova in response to this consultation.

The JLD is a division of the Law Society of England and Wales. The JLD is one of the largest communities within the Law Society with approximately 70,000 members. Membership of the JLD is free and automatic for those within its membership group including Legal Practice Course (LPC) students, LPC graduates, trainee solicitors and solicitors one to five years qualified.

Background

The current system was established as long ago as 2000 under the Minimum Terms and Conditions (MTCs) and the Compensation Fund. The consultation by the SRA seeks to determine whether or not the MTCs are proportionate. It is submitted that consumers generally have a low level of understanding of legal services regulation and assume that those within the legal profession maintain and carry the relevant protection from both a law firm and consumer protection perspective. It is submitted that there is also an expectation that as individuals within the legal field, the Regulator, in this case the SRA Would have set a high standard to ensure a consistent level of protection that all firms must meet.

Purpose of the Proposal

The current proposal by the SRA suggest that consumers should be tasked with investigating the level of their proposed solicitor's Professional Indemnity Insurance in order to make an informed decision as to whether or not they would instruct a particular solicitor. This is not only unrealistic but would be extremely burdensome for a consumer, especially one simply wishing for a resolution to their matter. This leads to the issue of whether or not such additional information would simply confuse a consumer, thereby affecting the overarching reason for this consultation.

Competition

It is not entirely excepted that competition is delivering good value in the insurance market. In its response to the consultation, the Law Society has produced its Annual PII survey which suggests that mean premiums fell by 7.7% between 2014 to 2015

and 2015 to 2016, and a further 1.3% between 2015 to 2016 and 2016 to 2017. The figure quoted is in respect of all Firms. However, when you look at the change in mean PII Premiums for sole practitioners between 2015 to 2016 and 2016 to 2017, this increased by 6.9%. Disappointingly in respect of firms with 2-4 partners , for the period 2015 to 2016 and 2016 to 2017, this increased by 11.8%. The current Code of Conduct permits solicitors with more than three years post qualification experience to establish their own law firms. Therefore, from a Junior Lawyers perspective, such an increase in premiums would adversely affect not only a Junior Lawyers' ability to set up and establish a law firm due to the cost but also reduce competition within the legal market as Junior Lawyers would be inhibited from starting their own practices. For completeness, the most significant reduction in PII premiums was referable to those firms with 11 to 25 partners. It is highly unlikely that a group of 11 to 25 Junior Lawyers would establish a practice and thereby benefit from any such reduction in costs.

The current MTCs ensure that insurers provide the same level of cover irrespective of the size of a firm. As outlined above, the proposal would adversely affect sole practitioners and smaller firms as they would be left in a highly precarious position in having to negotiate insurance terms on an individual basis rather than having a uniform base level of cover. In the event that this unnecessarily increases the costs of the running a firm, making it unsustainable, it is possible that a firm may no longer continue practising. This would affect all solicitors at those firms including those from the Junior end.

That said the market does already include the cost of risk in its existing premiums i.e. firms with low exposure to risk (those practising in family law, criminal law, immigration) pay lower premiums than those practising in high risk areas of Law (such as conveyancing).

Access to Justice

The Junior Lawyers Division has been a vocal champion for access to justice. In their consultation, the SRA suggest that part of their reasoning for these changes is to promote consumer choice and access to justice for people needing legal services. In short, the SRA proposes a claims limit. Currently, firms must have a minimum cover of £2 million, rising to £3 million for firms with certain structures. The SRA plans to reduce this to £500,000 for all firms apart from claims for conveyancing services. In respect of claims for conveyancing services, those carrying out conveyancing services would need a minimum of £1 million cover. The SRA states that this is because of the high risk of working in that area and making sure the public are protected where problems are most likely. The current proposal curtails the level of redress a consumer may have thereby reducing their ability to access justice. The cuts in Legal Aid have already affected a number of Junior Lawyers.

The SRA's position is one that by implementing their proposal, a law firm would make substantial savings which it would then pass on to its consumers. Therefore, those that could not, in the first instance afford to instruct a solicitor, would now be in a position to do so as a result of the savings to a firm's PII premium. This is, at best, far reaching and there is no guarantee whatsoever that such savings would be passed on to a consumer.

In its consultation, the SRA seeks to justify its proposal by suggesting that 4.8% of a client's bill may be determined by the cost of PII. Taking the SRA's estimated savings

of 9 to 17%, and assuming that firms decide to pass on to clients the savings in full, we might expect to see a reduction in fees of 0.4 to 0.8%.

On a review of the Legal Services Board research into the price of legal services for 2017, using their mean values of legal services in 2017 compared to the mean values of legal services expected post reform, such savings would be nominal.

Examples:

1) A sale of a freehold property, the mean price for legal services in 2017 was £650. When you consider the mean price of legal services, post reform, this equates to £644.70. This would provide a client with a projected saving of only *£5.30*.

2) An uncontested divorce, requiring a full legal service, the mean price of legal services in 2017 was £721. The mean price of legal services expected post reform is £715.12. This would provide the client with a projected saving of only *£5.88*.

3) Preparing an individual standard will, the mean price of legal services in 2017 was £195. In comparison, the mean price of legal services expected post reform is £193.41. This would provide a projected saving for a client of only *£1.59*.

It is the Junior Lawyers position that in choosing a legal provider, a client would tend to look at the appropriate expertise and qualifications of an individual when instructing them over and above the price that is been quoted for the services. That said, it is appreciated that price is a key factor when individuals are determining or differentiating between legal providers.

The Junior Lawyers Division concurs with the Law Society's review in that the level of cost savings for firms have been significantly overestimated. The information provided by the SRA suggest that a firm's overall compliance costs must be reduced in order for it to feel the effects of the savings. For the avoidance of doubt, the overall costs include any further top up cover, fees payable with respect to excesses, payments to the Compensation Fund not to mention the costs of implementing the proposed changes by the SRA. In its findings, the SRA states that more than one in 50 successful claims have settled for an amount in excess of £580,000. The level at which they have been settled is not provided. It would be helpful if this was forthcoming. Accordingly, the SRA's proposal that the claims limit be reduced to £500,000 would be detrimental to the profession as a whole. It is possible that most solicitors will choose to take on additional cover in the event that a claim is made against them. The cost of the top up could in essence outweigh any purported benefits highlighted in the SRAs consultation.

The Law Society rightly highlights the fact that that directors, partners, or other office holders may be required to obtain specific cover to protect against circumstances where staff have not obtained appropriate and adequate cover, which would prevent them from being sued in a personal capacity for breach of their duties by clients whose claims are not fully covered by the firms PII. The JLD is concerned that this may lead to junior lawyers being expected to obtain an insurance policy, out of their own pocket, due to the greater likelihood of employees being sued in a personal capacity when their firm's insurance proves inadequate. This is a concern to the JLD due to the

financial restraints already placed upon junior lawyers as a direct result of low income and debt associated with training. Also, the Law Society response highlights the possibility of the SRA's increased cost of enforcement that would stem from their efforts to ensure that all firms have obtained and maintain, a level of cover which is appropriate and adequate for the risk of their work. This simply cannot be a case where one cost reduction is replaced or substituted by a different cost.

In respect of the SRA's position that the current regulations surrounding PII are creating a barrier for firms wishing to enter the market, this is not accepted. No evidence has been provided by the SRA to demonstrate that the reforms proposed would alleviate such a barrier and allow for individuals to access the market. The Junior Lawyers Division echo the Law Society's comments in respect of this.

Accordingly, the conclusions reached by the SRA are fundamentally flawed. The evidence provided in support of their assertions is highly deficient as well as unclear.

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 Disagree

As outlined above, the Junior Lawyers Division strongly disagrees with the proposals to reduce the minimum level of cover from £2 million or £3 million, down to £500,000 or £1 million for conveyancing firms. In reality, if the majority of firms choose to provide the same level of cover as they currently have, the costs are likely to rise rather than fall as suggested by the SRA.

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 Disagree

The current proposals do not distinguish between those who are sophisticated purchasers of legal services (i.e. financial institutions and other large business clients) and those that are of lesser experience. The proposal makes an assumption of smaller businesses and suggests that they should be heavily regulated in comparison to financial institutions and other large business clients. Accordingly, the proposals indirectly seeks to criticise those from small businesses.

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

No

Please see our response to question two above. If it is the SRA's proposal to include a definition of a "large business", then this needs to be sufficiently suitable to ensure it provides the necessary protection for these types of large businesses. Whilst the current definition proposed by the SRA is based on one of turnover, it would be appropriate to include factors such as the number of employees, potential liabilities and possibly even assets. The current £2 million turnover figure selected as a threshold

is far too low. In the circumstances, a small business with a turnover of £2 million would, on the SRA's definition, be classified as a (large) business client, subject to the proposed regulation. It is the Junior Lawyers Division's position that such clients would benefit from the added protection in such circumstances.

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?

Somewhat disagree.

Whilst we are able to appreciate the SRA's reasoning in wanting to include a separate component within their PII arrangements, this adds an extra layer of complexity into the system. We do not agree that cover of the £1 million is suitable, however it is possible that if the minimum level requirements were to be increased to say £3 million for a firm practising in conveyancing, (with all those firms that are not practicing in conveyancing to say £2 million), this may be more acceptable. With the increasing prices of property, with particular reference to London, it is doubtful that cover of £1 million is sufficient for the same.

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

No.

We do not believe that the proposed definition of conveyancing services is appropriate. It is extremely broad and fails to consider the fact that the conveyancing has the ability to crossover into many areas of law including disputes, family, litigation and probate.

For example, on the breakdown of a marriage and financial resolution following a divorce, a Family Law solicitor may be instructed to deal with the simple task of having the transfer documentation signed by their client. According to the definition, this would fall within the meaning of conveyancing services and that solicitor would not be able to carry out this task. It would also mean that this Solicitor would need to instruct a specific conveyancing solicitor to carry out the same.

Also, with regard to Family Law, in instances where a Home Rights Notice is placed on a property belonging to one party but not the other, sufficient insurance would be required as this would fall within the definition of conveyancing services. The definition fails to take into consideration times when applications be required to the HM Land Registry on an ad hoc basis.

Where parties are attempting to enforce a court order requiring the transfer of a property, according to the definition, this would fall within the SRA's proposed definition of conveyancing services. Again, this is not something that the litigation solicitor would be able to do. And an insurer would be within their rights to exclude the claim.

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

Yes

We would support any changes to successor practice rules to provide clarification for

clients where practices have been purchased by other firms. Also, it would assist law firms to understand in what circumstances PI liabilities have been inherited and by whom. It is possible that in the event a successor practice is involved, there will be a query as to whether or not that practice will have adequate cover to meet future claims from historic negligence by the firm.

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

Somewhat disagree

The main change outlined in the SRA's proposal is for the curtailment of defence costs. A firm will need to create and maintain reserves to meet additional costs of potential claims. This will have an adverse effect on not only the confidence in the regulator but also law firms in general. As defence costs are not covered, it is likely that law firms will incur further expenses to avoid exposure to claims over and above the limit.

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 disagree

We have already explained why the flexible options offered by the SRA would not lower insurance costs. In fact, it is possible that with the SRA's proposal, a firm's cost may in fact increase due to top of cover and administrative costs rather than decrease which is the purpose of this consultation. This would mean that such costs would be passed onto client, hindering what the SRA is attempting to achieve with their proposal, competitiveness and reduced costs for firms and consumers.

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?

Neither agree or disagree.

The SRA offers no evidence as to their reasoning for the proposed level for the cap on cover in run-off. It is noted that there is currently a substantially high cost of run-off. It is understood that this tends to be three times the annual insurance premium, irrespective of the history and risk profile of a firm. The SRA is asked to produce evidence to confirm that it is able to reduce the cost of insurance in the run-off period.

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

Strongly disagree.

The SRA has failed to provide any evidence to support it assertion that PII presents a barrier to entry. Further, it has failed to provide any evidence to support its view that these proposals would result in additional firms entering the market. We do not accept that the changes would reduce the overall cost of insurance thereby allowing a competitive market place and new entrants to the same.

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

It is the SRA's position that the proposed consultation with benefit small law firms. We do not believe that a proper impact assessment has been conducted in respect of the same. It is well known that small firms are more likely to have high number of black and minority ethnic (BAME) and or female solicitors, not to mention, Junior Lawyers. Accordingly, this could have a bearing on the diversity of the profession. When looking at the type of work commonly associated with small firms, this would encompass conveyancing. Accordingly, not only will small law firms be required to purchase the standard level of cover, on the SRA's proposal of £1 million, it is possible that they would also be required to obtain quotes for top-up cover. In general, the compliance costs for all firms will increase. This would adversely affect small firms who cannot readily afford the increased costs.

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?

The issue of run-off has already been highlighted above and must be addressed in any future consultation or amended proposal.

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.

Somewhat disagree

The Junior Lawyers Division supports the analysis completed by the Law Society namely the legal risks involved as well as policy consideration.

The primary purpose of the Compensation Fund, according to the SRA Handbook is "*to replace money which a defaulting practitioner or a defaulting practitioner's employee or manager has misappropriated or otherwise failed to account for*." It is our understanding that the Fund is available in cases where fraud and failures to account for money are not covered by a firm's mandatory PII policy i.e. any gap in protection. The SRA has failed to provide sufficient information with respect to the claims it receives, handles and closes in the course of the year. There is also no information on the distinction between claims for dishonesty.

The Compensation Fund must be sufficient to protect innocent clients (as well as third parties) against loss. In the event that they are not protected, this will harm the reputation of the profession and reduce public confidence in the profession.

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? Please explain why and provide any evidence that supports your view.

Again, the Junior Lawyers Division supports the analysis completed by the Law Society namely the inclusion of a cumulative limit on claims from one investment scheme and the reduction of intervention costs.

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

Strongly disagree.

This proposal is discriminatory. This would not only be wholly unfair but undermine the public interest in proper standards. By way of example, individuals who are under the age of 30, living with parents, would be restricted if their parents hold assets over £250,000. Also, to place a bar on individuals on the fact that they live in a wealthy household would suggest that they have disposable sums to adequately be remunerated for the failings by legal professionals. It is possible that this would in turn result in a subpar service to those individuals, as legal professionals would be aware that the limit of claims against them is capped or that they cannot apply.

By removing them from the Compensation Fund, it removes consumer protection and will undermine the confidence that consumers can have when using a solicitor thereby impeding trust in the profession.

Question 16: Do you think our proposed measure of wealth and threshold for excluding these applications in appropriate?

No

If no, do you have any suggestions for an alternative measure of wealth and or at what level the threshold should be set.

Please see our response to Question 15. The Junior Lawyers Division does not support the exclusion of wealthy households as a category of claimant.

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

If yes, please set out your suggestions and reasons for the change.

Again, the Junior Lawyers Division supports the position by the Law Society. The SRA should consider the way that the risk of large investment schemes could be managed. There is further data and clarification required from the SRA namely: -

1) The nature and extent of claims that are paid where firms carry no insurance for negligence, together with a differential on the types of firms / number of partners.

2) In circumstances where a firm hold the basis £500,000 limit as proposed by the SRA, and that firm carries out conveyancing services (for which the proposed minimum limit is £1 million), what is the position and penalty in respect of the same. Would the Compensation Fund on the SRA's proposal cover any deficient or these claims? If it did not, this would penalise an innocent client.

3) An analysis of the impact on Fraud or Dishonest claims on the insurance of a firm. In circumstances where there has been no fraud or claims of dishonesty, how would this impact or assist firms?

4) With regard to top-up insurance, the potential costs of the same, what levels could be purchased and details of insurers spoken to in respect of this point. An overall costs analysis of the total costs of the insurance (inclusive of the top up insurance to the current level) versus the current level.

5) The cost of insurance for start-up firms is disproportionately high. How would the new proposal address this and ensure that there is a fairness. The SRA offers no comparator of the costs of insurance for start-up firms now to how these would differ with the SRA's current proposal.

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

No

Further information and clarification is required i.e. details of historical claims as well as details of projections about scale and nature of risks.

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

No

If no, please explain your answer and any suggestions you have for alternative approaches.

The current fails to take into consideration the potential increase in claims for firms which have inadequate insurance or no insurance at all. Further, there has been a significant increase in cyber crime and money laundering, where individuals are specifically targeting law firms. Therefore, further consideration may need to be provided on whether these should fall within the remit of the fund.

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?

There is general Government guidance on issues such as financial investments. Ultimately, the onus is on the individual unless a legal professional has been instructed to advise on the merits of a specific scheme or transaction. It is also important for the legal profession to recognise that if there are any irregularities that these be reported using the proper channels. In circumstances where consumers go against this advice and are simply reckless in what they are doing, as a direct consequence of a failing on their part, it would be unjust to place such blame on a solicitor.

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

The Junior Lawyers Division is a strong advocate in ensuring that clear guidance is available. Such information should be simple to understand and digest by consumers, clients and those in the profession.

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?

If yes, please explain what you think these impacts are.

We have dealt with EDI in detail above however we are unable to provide a substantive comment without detailed quantification of impacts, taking into consideration age, practice type, number of directors, size of a firm. No information appears to have been canvassed from EDI (Legal) Groups such as Society of Asian Lawyers, Black Solicitors Network etc.

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

The SRA's guidance in respect of a Law Firms requirements surrounding cyber-crime is, at best, ambiguous. The SRA could provide a checklist of some sort / bulleted details of minimum compliance requirements by a legal profession, which would address this issue. This will provide some reassurance to legal professions that they are meeting the minimum standard as set by a regulator. In circumstances which are outside of a law firm or Solicitor's control which respect to cyber-crime, the SRA should provide a voice to those law firms and or solicitors to ensure this is made known so that there is no adverse impact to their reputation or loss of confidence in them.

Nick Gova, director of Garrick Law Limited on behalf of the Junior Lawyers Division
June 2018