

# Master Policy Professional Indemnity Arrangements

## Year 1 update report

5 January 2023

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## 1. Background

### a. Our 2021 report

The 2007 Act gives the SLCC powers to monitor the effectiveness of professional indemnity arrangements.<sup>1</sup> In November 2021, following an invitation to observe the tender of the Master Policy carried out by the Insurance Committee of the Law Society, the SLCC published a report<sup>2</sup> which reflected on the process of the tender and made recommendations for future exercises. It also considered wider issues relating to the effectiveness of the indemnity arrangements.

### b. Our starting point

The SLCC's views on the Master Policy proceed primarily from an interest in ensuring that where redress is awarded the complainant should, wherever possible, receive that redress in full. Depending on the circumstances of the case, the Master Policy may play a part in this. As such the Master Policy can and does form an important consumer protection tool and can help to drive public and consumer confidence in legal services.

In recent years the Insurance Committee, the brokers and the SLCC have worked collaboratively to address specific issues in relation to the Master Policy. That has allowed a number of outstanding claims to be covered, and updated the Master Policy terms to ensure future awards can be made in additional circumstances.

In addition to its role in supporting redress, we have welcomed the role of the broker in using evidence and insight from claims data to help inform and advise the profession on risk management, following the excellent work of the Insurance Committee to establish the requirement for a minimum of one hour 'risk management' CPD for all solicitors. This complements the work of the SLCC in providing guidance to the profession on recognising and avoiding the common causes of complaints, and good complaint handling. This is a key tool in ensuring the profession provides a professional service to clients and helps to reduce the likelihood of avoidable complaints and claims.

The Master Policy is an important consumer protection tool and the Law Society and SLCC share an interest in ensuring that it supports public and consumer confidence in regulated legal services.

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<sup>1</sup> [Legal Profession and Legal Aid \(Scotland\) Act 2007](#), Section 39

<sup>2</sup> [Master Policy \(scottishlegalcomplaints.org.uk\)](https://www.scottishlegalcomplaints.org.uk)

## 2. Key findings and recommendations

### a. Findings and recommendations from our 2021 report

In our 2021 report we set out a number of recommendations relating to the tender process, and wider indemnity arrangements. The recommendations were:

- The Law Society should consider setting out a clear policy statement on the overall purpose of indemnity insurance arrangements for the solicitor profession, and the role of the Master Policy specifically in achieving the stated aims
- There should be a clear role and opportunity for the Regulatory Committee to input to the approach and wider thinking on how indemnity arrangements support both consumer protection and public confidence
- The tender process should begin with a clear statement of rationale/ purpose of the tender and the services required
- Any market analysis should be thorough, and include discussions with providers who chose not to tender (to remove barriers and for future learning) and due diligence regarding any potential conflicts
- The decision making process should be set out clearly and transparently to both the profession and the public – it is vital that both groups have confidence in the way decisions are made, and the opportunity to input, question and challenge them, as required
- The Law Society should ensure that learning from the operation of the Master Policy, including the views of the profession and claimants, informs future decision making.

We noted that we would like to work with the Law Society to understand the full trajectory of decisions, including:

- How the Law Society keeps the role of client protection supports and indemnity arrangements, including the Master Policy, under review, including the minimum requirements set
- What policy statements the Law Society has developed regarding indemnity arrangements/ the Master Policy, and how these are applied and kept under review
- How that thinking informs the five-yearly tender process, to ensure that it helps the Society to achieve its stated aims
- How annual terms are developed which draw on that wider thinking, and which draw learning from previous years to refine and adapt to current conditions.

Finally, our 2021 report set out an indicative timeline for both the Law Society and the SLCC to address these issues, although we noted that the Society may wish to propose an alternative approach. For this past year, the actions we had identified were:

SLCC business year starting	LSS business year starting	Actions	Assessment by the SLCC
Jul 21	Nov 21	<ul style="list-style-type: none"> <li>• SLCC to publish this report</li> <li>• LSS to publish its response to this report</li> <li>• LSS to set out its own five year trajectory to the next tender and to publish this</li> <li>• Insurance Committee to share annual terms with SLCC</li> </ul>	<p>Is a response to our report published? (Yes/No)</p> <p>Has LSS set out a five year plan (Yes/No)</p> <p>Does the five year plan include all of the actions below (Red/Amber/Green)</p> <p>Has the Committee shared annual terms? (Yes/No)</p>

Our recommendations are intended to be constructive, but we recognise it is for the Insurance Committee and the Society to consider how to respond to them.

#### b. Discussion with the Law Society of Scotland

In advance of publication of our report, we shared a confidential draft with the Insurance Committee, and received a substantive response from the Convener. We responded to the specific points raised by the Committee, noting where we had made amendments to the report in response to those points, and clarifying our plans for publication.

Following publication, we have continued dialogue, and shared a draft of this update report, which we understand was discussed by the Committee in November 2022. We met shortly afterwards to discuss the report's aims, findings and recommendations. That was a constructive meeting and we hope to be able to continue that approach.

While there has been a robust debate about the report's findings, and continued difference of opinion on some key issues, we have welcomed the opportunity to better understand the Law Society's views and processes in relation to the Master Policy. We hope it has also provided an opportunity for the Law Society to better understand our aims and to consider how assurance could be provided that the way indemnity arrangements are governed and delivered is informed by regulatory need.

### c. The role of the Regulatory Committee

One key point of discussion is the role of the Regulatory Committee of the Law Society in relation to indemnity arrangements. Our report noted that the Insurance Committee is a Member Services Committee of the Law Society and therefore does not sit as a regulatory sub-committee operating under a schedule of delegated powers from the Regulatory Committee. We said that "it is not clear to what extent, if any, the Regulatory Committee of the Law Society can or does have any input into either overarching policy discussions on the role of indemnity arrangements in helping to meet the Society's consumer protection aims, or on the operation of the Master Policy specifically". We stated that we believe it would be appropriate for the Regulatory Committee to make its views on indemnity arrangements known.

In contrast the Society has set out its view that "most of the regulatory functions apply when a practice unit wants to use an alternative to the Master Policy and relate to the Society being satisfied with the alternative cover proposed". That specific role is delegated by the Regulatory Committee to the Practising Certificate Sub-Committee, but is restricted to the requirement to have sufficient, appropriate insurance in place.

However, the Society has made clear that it believes other indemnity related functions, including those discharged by the Insurance Committee, to be "non-regulatory work". This includes:

- conducting the tender for the brokerage and administration of the Master Policy
- approving and amending policy terms
- determining limits of indemnity and self-insured amounts
- putting in place a risk management programme for members via the brokers
- analysing risk affecting the Master Policy and make recommendations on mitigating measures
- reviewing performance of the Master Policy

- liaising with the SLCC with respect to its oversight of the PII arrangements.

The SLCC disagrees that these functions should be considered fully ‘non-regulatory’ given their statutory basis, the link to consumer protection, and the SLCC’s powers of oversight. While the SLCC and LSS now have a better understanding of each other’s respective positions, it appears this discussion has reached an impasse. We understand that these conversations have been shared with the Regulatory Committee, so we must assume that it is also content that there is no regulatory input required to the Society’s indemnity arrangements, beyond those delegated to the Practising Certificate Sub-Committee. We would urge the Regulatory Committee to reconsider this view.

Following our discussions, we note that the Society has made changes to its website content on the Master Policy and the work of the Insurance Committee<sup>3</sup>. While this fresh look at the public facing information is helpful, we are concerned that this could now suggest (through reordering and colour coding) that the Insurance Committee is a sub-committee of the Regulatory Committee. This is concerning because the specific requirements of a regulatory sub-committee are a 50% lay and 50% solicitor membership and a requirement to adhere to the regulatory objectives set out in the Legal Services (Scotland) Act 2010. This is not the case for the Insurance Committee, and could therefore be misleading.

We did also discuss the ways in which the Insurance Committee works to monitor claims, patterns, and changes to risk profile, and the way in which it has been able to respond to emerging issues. We welcomed this approach and have seen the benefits of it in making changes to terms or securing payments for clients who would otherwise not have their claim covered. While we understand that this work is delivered in discussion with regulatory colleagues at the Society, we would still welcome a more structured arrangement to give assurance that regulatory needs are always front and centre of these discussions.

#### d. Our assessment of progress this year

In the absence of any alternative proposal from the Society, we have considered progress against the recommendations we set out above, taking into account any other action which we have seen in relation to the indemnity arrangements.

The Insurance Committee has shared the Master Policy annual terms with the

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<sup>3</sup> [Our committees | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk)

SLCC, which is appreciated.

The Law Society has not published any response to our report, although we are aware that the Insurance Committee has considered our report, and discussion on the issues raised has taken place via the correspondence outlined above and in our recent constructive meeting with the Convener.

However, the Society has indicated that while it is open to continued discussion on any specific failures or concerns about effectiveness of the Master Policy, it will not be responding to our recommendations as it believes the report is inconsistent with the terms of our statutory authority under s39 the Legal Profession and Legal Aid (Scotland) Act 2007. We continue to disagree on this point.

In doing so the Society has shared its interpretation of the legislation, and the parliamentary debate that shaped it, as extending only limited 'light touch' oversight. We consider that our approach is proportionate. We have sought to align recommendations to the existing work of the tender, suggested they are phased over a number of years, and offered the Society discretion to propose alternative approaches, should it wish. As such, we are seeking to act in a proportionate way and in line with the discretion given in this section of the Act.

It is our view that it is for the Society to provide assurance to us, as oversight regulator of the effectiveness of the indemnity arrangements, that the Master Policy is operating well and in line with the regulatory objectives in order to ensure consumer protection and public confidence. That is what we are seeking to achieve with these recommendations.

Therefore, the RAG rating we have assigned to the actions we set out is currently as follows:

Action	Assessment	RAG rating
LSS to publish its response to this report	Is a response to our report published? (Yes/No)	No, although responses sent via correspondence and discussed in person
LSS to set out its own five year trajectory to the next tender and to publish this	Has LSS set out a five year plan (Yes/No)	No



	Does the five year plan include all of the actions identified (Red/Amber/Green)	No plan published
Insurance Committee to share annual terms with SLCC	Has the Committee shared annual terms? (Yes/No)	Yes

### 3. Conclusion

This is the first annual update report we intend to publish, following our 2021 report. It is therefore not unexpected that there has been little progress to report.

However, we expect that the next tender process will formally commence in mid-2025 to appoint a broker for the five-year period starting January 2027. For any of these recommendations to inform that process, it is important that they are considered, and where appropriate, acted upon, over the coming years.

We stand ready to work with the Society, the Insurance Committee and the Regulatory Committee to achieve this.

## Appendix – Proposed approach for the next five years

The table below was published in our 2021 report, setting out our proposed approach to assessing action against the recommendations we had made. We stated that we would like to encourage the Law Society to set out a five year programme up to and including the next tender exercise. The timescales outlined here are indicative, but would allow all points to be considered in a timely way in advance of the next tender exercise. The SLCC will discharge its oversight function by publishing an update each year on progress made.

SLCC business year starting	LSS business year starting	Actions	Assessment by the SLCC
Jul 21	Nov 21	<ul style="list-style-type: none"> <li>• SLCC to publish this report</li> <li>• LSS to publish its response to this report</li> <li>• LSS to set out its own five year trajectory to the next tender and to publish this</li> <li>• Insurance Committee to share annual terms with SLCC</li> </ul>	<p>Is a response to our report published? (Yes/No)</p> <p>Has LSS set out a five year plan (Yes/No)</p> <p>Does the five year plan include all of the actions below (Red/Amber/Green)</p> <p>Has the Committee shared annual terms? (Yes/No)</p>
Jul 22	Nov 22	<ul style="list-style-type: none"> <li>• Review of governance of indemnity arrangements</li> <li>• Review of appropriateness of Master Policy in meeting the requirements of the 1980 Act</li> </ul>	<p>Has LSS conducted a review of governance of indemnity arrangements? (Yes/No)</p> <p>Does the review consider the issues raised in this report? (Red/Amber/Green)</p> <p>Has LSS conducted a review of the appropriateness of Master Policy in meeting the requirements of the 1980 Act? (Yes/No)</p>

			Does the review consider the issues raised in this report? (Red/Amber/Green)
Jul 23	Nov 23	<ul style="list-style-type: none"> <li>• LSS engagement with profession on experience of the Master Policy</li> <li>• LSS engagement with claimants on experience of the Master Policy</li> </ul>	Has LSS engaged with the profession and claimants to inform tender criteria? (Yes/No)
Jul 24	Nov 24	<ul style="list-style-type: none"> <li>• LSS publish clear statement of rationale/ purpose for the tender and construct tender criteria</li> <li>• LSS and SLCC to agree observation of the tender exercise</li> </ul>	Has LSS published a statement on the tender? (Yes/No)  Has observation been agreed? (Yes/No)
Jul 25	Nov 25	<ul style="list-style-type: none"> <li>• Tender exercise</li> </ul>	Has the tender exercise been completed satisfactorily? (Red/Amber/ Green)
Jul 26	Nov 26	<ul style="list-style-type: none"> <li>• LSS to run an internal 'lessons learned' and provide outcomes to the SLCC</li> <li>• SLCC to publish assessment of tender process, and close out report on the five year cycle</li> </ul>	Has a 'lessons learned' exercise been completed? (Yes/No)  Has a final report been published (Yes/No)