

THE LAW SOCIETY OF NSW

# PROFESSIONAL STANDARDS SCHEME

*Improving standards. Reducing risk.*



THE LAW SOCIETY  
OF NEW SOUTH WALES

# **BENEFITS OF JOINING THE SCHEME**

## **1 Limitation Of Liability**

---

## **2 Flexibility With Higher Caps**

---

## **3 Better Risk Management**

---

## **4 Demonstrate Value To Clients**

---

### **Table of Contents**

What is a Professional Standards Scheme?	3
Recognised Tradition of Our Members' Professional Standards	4
What's New in This Scheme?	5
A New Scheme – A New Opportunity to Manage Your Risk	6
Scheme Benefits	8
How Does the Law Society Administer and Operate the Scheme?	12



## **WHAT IS A PROFESSIONAL STANDARDS SCHEME?**

*The Law Society of New South Wales (the Society) was the first legal occupational association in Australia to develop and administer a statutory scheme (a Scheme), enforced by the Courts that capped the amount of damages that could be awarded against a law practice for occupational liability.*

# RECOGNISED TRADITION OF OUR MEMBERS' PROFESSIONAL STANDARDS

*The Society has continuously administered Schemes as an exclusive benefit for its Members since 1996.*

After an extensive application process, the Society is very pleased to announce that the Professional Standards Council has approved its newly named “*The Law Society of New South Wales Professional Standards Scheme*” (the Scheme) due to commence on 22 November 2018.

The Society and its Members deserve to be proud of this new Scheme’s accreditation by the Professional Standards Council. It reconfirms the Society’s position as the largest legal occupational association in Australia that provides a Scheme of this nature.

It also affirms the Society’s sound practice and risk management strategies, support, services and vision for its Members, that, when combined with its effective licensing and regulation of the solicitor branch of the legal profession, continues to:

- sufficiently demonstrate its ongoing commitment to improvement of the professional standards of its Members;
- adequately protect consumers of legal services;
- increase consumer confidence in our profession; and
- establish compliance with professional standards legislation.

The Scheme itself is a legal instrument that also requires the Society to monitor, enforce and improve the professional standards of Participating Members to enhance consumer protection for users of legal services. The Professional Standards Council oversees the operation of the Scheme via the Professional Standards Improvement Programme.



## WHAT'S NEW IN THIS SCHEME?

Our new Scheme will differ from previous Schemes in four (4) main ways:

1

### Name Change

The new Scheme will be known as *The Law Society of New South Wales Professional Standards Scheme*.

### Incorporated Legal Practices

Incorporated Legal Practice (ILP) entities can now participate in the Scheme.

2

3

### Mutual Recognition

The new Scheme is designed to be recognised in other states and territories.

### New Logo

Scheme participants will be entitled to use the Society's Professional Standards Scheme logo.\*

4



*\*The Cover of Excellence® logo can no longer be used for Schemes approved after February 2014.*

# A NEW SCHEME – A NEW OPPORTUNITY TO MANAGE YOUR RISK

## Who can participate in the Scheme?

Subject to meeting all Scheme requirements the Scheme applies to:

- (a) Solicitor and Life Members of the Society engaging in private practice who are not excluded or exempted from the Scheme;
- (b) Partners and employees of Solicitor and Life Members of the Society who are not excluded or exempted from the Scheme;
- (c) Incorporated Legal Practice Members of the Society that have not been exempted from the Scheme;
- (d) Officers or employees of Incorporated Legal Practices that are Members of the Society and that have not been excluded or exempted from the Scheme;
- (e) All persons to whom the Scheme applied when the act or omission giving rise to the relevant cause of action arose.

## How is the Scheme different to your Insurance?

Professional indemnity insurance (PII) does not serve to limit your occupational liability.

Your PII however is important because the Society's Scheme limits the liability of Scheme Members by insurance arrangements under s.21 of the *Professional Standards Act 1994 NSW* (the Act).

This means that participation in the Scheme requires the law practice to hold PII to a level *no less than* the limitation cap sought.

## What is Covered by the Scheme?

Under the Act, the Scheme provides for limitation of occupational liability arising from a single cause of action. The Scheme covers acts or omissions that occur after the commencement of the Scheme.

The Act defines “Occupational liability” as meaning civil liability arising (in tort, contract or otherwise) directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of their occupation.

## **What is Not Covered by the Scheme?**

The Act specifically excludes coverage of liability arising from:

- the death of, or personal injury to, a person;
- a breach of trust;
- fraud or dishonesty; or
- liability which may be the subject of proceedings under Parts 13 or 14 of the *Real Property Act 1900*.

The Scheme can only affect liability for damages arising from a single cause of action to the extent to which liability results in damages exceeding the limitation amount.

Claimants who have a joint interest in a cause of action are treated as a single claim for the purposes of the Act. Where one person has two or more claims arising out of a single event against persons to whom the Scheme applies and who are associated, those claims are treated as a single claim under the Act. Associated defendants are partners, employees of the same employer or persons who are in a relationship of employer and employee.

It is important to note that damages do not include defence costs.

## **Where does the Scheme apply?**

The Scheme includes a provision for mutual recognition.

It recognises that the provision of legal services transcends state boundaries. Approval of the Scheme under professional standards legislation of another state or territory is designed to have the effect of limiting the liability of any person to whom the Scheme applied at the Relevant Time (as defined in the Scheme instrument) at which the relevant act or omission occurred and where the act or omission occurred in the state or territory that has recognised the Scheme.

If your NSW office is part of a national practice, or if you conduct work interstate, specific consideration should be given to the effect of the mutual recognition provisions of all relevant legislation to ensure that the Scheme applies to all parts of your practice.

# SCHEME BENEFITS

## 1. Limitation of Liability

In principle, if proceedings are brought against a Participating Member relating to occupational liability for damages arising from a single cause of action, and the Participating Member can show that:

- (a) they are a Member of the Law Society and participant in the Scheme at the time the cause of action arose; and
- (b) they have an insurance policy insuring against occupational liability to which the cause of action relates; and
- (c) the amount payable under the insurance policy is no less than the amount of the relevant monetary ceiling specified in the Scheme;

then the Court, in awarding damages, will limit those damages to the relevant monetary ceiling specified in the Scheme.

The limitation cap amounts are as follows:

Class	Description	Monetary Ceiling
1	Participating Members who were at the Relevant Time in a Law Practice consisting of up to and including 20 Principals and where the Law Practice generates total annual fee income for the financial year at the Relevant Time up to and including \$10m.	\$1.5 million
2	(a) Participating Members who were at the Relevant Time in a Law Practice consisting of more than 20 Principals; or (b) Participating Members who were at the Relevant Time in a Law Practice where the Law Practice generates total annual fee income for the financial year at the Relevant Time greater than \$10m.	\$10 million*

\*(Note: Certificate of Top Up PII cover must be provided)



Top Up Insurance is required for a cap above \$1.5m.

Please speak with your insurer directly about the requirements of Top Up insurance and how it might work for your particular circumstances.

## **2. Flexibility - A Discretionary Higher Cap Option (DHC)**

Provided you are participating in the Scheme at a primary limitation amount in Class 1 or Class 2, then your law practice can subsequently apply for a higher cap - subject to approval from the Law Society Scheme Administration Committee for:

- (a) all cases; or
- (b) in any specified class or case.

Law practices who tender for government contracts and those who work on specific large transactions or clients have availed themselves of the discretionary higher cap option as a positive risk management strategy for their law practice.

### **3. Risk Management – We Want To Engage With You**

The Society is sensitive to the needs of its Members. It has identified seven key areas of risk particular to the demands of legal practice. These risks are:

1. Gap in doctrinal law knowledge;
2. Business and practice management;
3. Service delivery of advice and communications;
4. Vulnerable consumer clients;
5. Wellbeing issues of Members;
6. Changing legal practice landscape;
7. Accelerants of these risks.

Our identification of risks, and our ongoing response to them through development of support services, strategies and education to help Members, irrespective of their practice areas, structure and size, to manage those risks, was key to the Professional Standards Council acknowledging our commitment to improving professional standards.

The purpose of these strategies and programmes is to help you best deal with the demands of legal practice in the current and fast changing legal practice landscape.

### **4. Your Clients Know That You Are Committed to Standards Approved by the Professional Standards Council**

Being part of a Professional Standards Scheme conveys to your clients that you are committed to being regulated under professional standards legislation, and to upholding high standards and consumer protection.

In fact, under the professional standards legislation you are required to disclose to your clients that your law practice does participate in the Professional Standards Scheme.



## Notice Requirements to Clients

The *Professional Standards Act 1994 (NSW)* and the *Professional Standards Regulation 2014 (NSW)* require Participating Scheme Members to disclose their limited liability status.

The following notification is prescribed:

“Liability limited by a scheme approved under Professional Standards Legislation.”

The Professional Standards Councils has directed that disclosure should appear on all documents given to clients or prospective clients that promote or advertise the Scheme Member or their occupation, including but not limited to documentation, letters, emails, fax cover sheets, fee statements and invoices.

In its disclosure fact sheet, the Professional Standards Councils direct that the disclosure statement should appear on:

- letterhead and letters signed by the law practice or on its behalf
- emails
- fax cover sheets
- documentation, including written advice, memorandum of fees and invoices, and other documents produced for clients which are not accompanied by a covering letter containing the disclosure statement
- newsletters and other publications
- websites.

# HOW DOES THE LAW SOCIETY ADMINISTER AND OPERATE THE SCHEME?

## 1. Participation in the Scheme

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all legal practitioners (i.e. any person who holds a current NSW practising certificate) within the law practice will need to be Members of the Law Society. Participation of Society Members in the Scheme is required by the professional standards legislation (s.28(4) of the Act) except in the case of those Members who seek and obtain exemption.

If your law practice is an Incorporated Legal Practice, it is also required to be a Participating Member if it seeks coverage under the Scheme.

## 2. Participation Process

To facilitate this administrative task the Society requires an authorised principal of each law practice to be the Scheme Co-ordinator. As it has done in the past for the Scheme participation process, the Society will designate an authorised principal of each law practice to be the Scheme Co-ordinator.

That authorised principal must ensure that they are authorised to apply for participation in the Scheme for all legal practitioners in their law practice *after discussion with their practitioners* about the Scheme.

## 3. Exemption Process (“Opt Out”)

The Professional Standards Council has approved the Scheme. For those law practices that do not wish to participate in the Scheme, application should be made in respect of all Society Members within the law practice. The Society is required to maintain a register of its Members who have been granted exemption from the Scheme.



Members should note that a person who is exempted from the Scheme will not be able to rely on the Scheme to limit liability if a claim is brought against them. Please note that the exemption will be recorded as effective for the duration of the Scheme year or until a subsequent application for participation is registered.

#### **4. What Do I Need To Do If Someone New Joins Or Leaves My Law Practice?**

##### **If your law practice is in the Scheme**

To ensure your law practice can rely on the Scheme, all eligible lawyers must be Participating Members of the Scheme. Therefore, if a new practitioner joins your law practice please:

- (1) Have the Scheme Co-ordinator contact the Society's Scheme Team on 9926 0189 to confirm if that person is a Society Member and, if so, whether they are currently registered as a Scheme participant
- (2) If not, complete the following forms, as applicable, and return them to the Society:
  - (a) Law Society Membership Form, with the requisite payments:
  - (b) 2018-2019 Additional Scheme Participants Form.

## HOW DOES THE LAW SOCIETY ADMINISTER AND OPERATE THE SCHEME?

### If your law practice has been granted an exemption from the Scheme

If your law practice has been granted an exemption from the Scheme then you will need to make sure that any new practitioner, if they are a Member of the Law Society, authorises you to apply for exemption from the Scheme on their behalf and then complete the exemption application.

### 5. Compliance

The Society requires the Scheme Co-ordinator to complete various undertakings and declarations of compliance with the Scheme and its requirements. The Society is obliged to audit and follow up non-compliance. Under the Act, the Society is obliged to report non-compliance in its annual report to the Professional Standards Councils.

### 6. Fees

An annual fee of \$105 will be payable for each Solicitor Member to participate in the Scheme.

*A small sum for peace of mind.*



Each Scheme must be approved by the Professional Standards Council pursuant to the Professional Standards Act 1994 (NSW).



## **How do Occupational Associations get a Professional Standards Scheme?**

Each Scheme must be approved by the Professional Standards Council pursuant to the *Professional Standards Act 1994 (NSW)*.

The Professional Standards Councils states on its website that to have a Scheme approved the association must:

- “1. Demonstrate to us that the people they represent form a genuine professional community that can protect consumers and meet high levels of professionalism by completing our rigorous application process.*
- 2. Draft a Professional Standards Scheme in line with professional standards legislation and submit it to the Professional Standards Councils for approval.*
- 3. Participate in ongoing compliance and professional standards improvements programs. This includes submitting detailed annual reports that show how they’ve regulated their members, taken action against those who don’t meet their standards, and increased consumer protection in their industry.”*

# WHAT HAPPENS NEXT?

Applications can be made online from early October 2018.

Either:

## 1. APPLY FOR PARTICIPATION

or

## 2. APPLY FOR EXEMPTION

For further information please visit [lawsociety.com.au/scheme](http://lawsociety.com.au/scheme)

Disclaimer: This publication provides general information of an introductory nature and is not intended and should not be relied upon as a substitute for legal or other professional advice. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors or the Law Society of New South Wales and any liability is hereby expressly disclaimed. Current as at August 2018.

### THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney

ACN 000 000 699 • ABN 98 696 304 699

T +61 2 9926 0189 • E [scheme@lawsociety.com.au](mailto:scheme@lawsociety.com.au)

[lawsociety.com.au](http://lawsociety.com.au)