

# THE LAW SOCIETY OF NEW SOUTH WALES PROFESSIONAL STANDARDS SCHEME

## FREQUENTLY ASKED QUESTIONS

Updated 2 March 2020.

This is an information sheet containing frequently asked questions on The Law Society of New South Wales Professional Standards Scheme (the Scheme).

### WHAT IS A PROFESSIONAL STANDARDS SCHEME?

A Professional Standards Scheme is a legal instrument, that binds an occupational association (such as the Law Society of New South Wales (the Society)) to monitor, enforce and improve the professional standards of its Members, and protect consumers of professional services.

The Society is an occupational association that has had its Scheme approved by the Professional Standards Councils, after having demonstrated that it represents a professional community that can protect consumers and meet high levels of professionalism for the purpose of professional standards legislation.

In return for these commitments, its Professional Standards Scheme caps the civil liability or damages that professionals who take part in an occupational association's scheme may be required to pay if a court upholds a claim against them.

The professional standards legislation is state based, and the relevant Act in NSW is the [Professional Standards Act 1994 \(NSW\)](#) (the Act).

### 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.

Occupational liability is defined in the Act as follows: "*occupational liability*" means 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 his or her occupation.

### HOW WILL THE SCHEME WORK?

In principle, if proceedings are brought against a participating Scheme member relating to occupational liability for damages arising from

a single cause of action, and the participating Scheme member is able to show that:

- a) the participating Scheme member has the requisite professional indemnity insurance (PII) cover insuring against occupational liability to which the cause of action relates; and
- b) the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the Scheme,

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

If the participating Scheme member is not able to satisfy the Court that he/she/it has the requisite insurance cover, or that the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the Scheme, he/she/it will not be entitled to rely on the Scheme to limit liability for damages.

### WHO CAN PARTICIPATE IN THE SCHEME?

- Solicitor Members
- Life Members
- ILP Members

Subject to meeting *all* Scheme requirements coverage under the Scheme extends to:

- a) A Solicitor Member or Life Member who is engaging in private practice who is not excluded or exempted from the Scheme;
- b) An Incorporated Legal Practice (ILP) entity that is itself an ILP Member of the Society that is not excluded or exempted from the Scheme;
- c) Partners and employees of Solicitor Members and Life Members of the Society who are not excluded or exempted from the Scheme;
- d) Officers or employees of law practices that are Members of the Society and who 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.

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### WHY IS IT A REQUIREMENT THAT ALL SOLICITOR AND LIFE MEMBERS OF THE LAW SOCIETY APPLY FOR PARTICIPATION IN, OR EXEMPTION FROM, THE SCHEME?

In order to meet the requirements of the Scheme, as approved by the Professional Standards Councils and in accordance with the Act, all Solicitor Members, Life Members and ILP Members are required to either apply for participation in, or exemption from, the Scheme. The Society administers this participation and exemption process through the relevant law practice.

### HOW IS THE SCHEME DIFFERENT TO PROFESSIONAL INDEMNITY INSURANCE?

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

Your PII however is important because the Scheme limits the liability of Scheme participant members by insurance arrangements under s.21 the Act.

Scheme participants must have the benefit of PII no less than the amount of the limitation of liability applying to the Scheme participant at the Relevant Time (as defined in the Act), which insurance complies with standards set from time to time by the Society in accordance with s.27 of the Act.

Each year Scheme participants are required to provide to the Society evidence of coverage by PII to the necessary standard and certify that their law practice has sufficient business assets to cover any claim made up to the amount of any excess applicable to the law practice's insurance.

Participating Scheme members are required to certify annually with their practising certificate application that they have completed continuing professional education requirements.

Participating Scheme members who are required or choose to take out insurance in excess of \$1.5 million must ensure the excess cover:

a) has at least one automatic reinstatement each year;

- b) covers all civil liability arising in connection with the practice;
- c) is retrospective for any event giving rise to a claim made during the insured period;
- d) extends to all employees of the practice or service entity;
- e) is a "claims made" policy.

### WHO IS EXEMPTED FROM THE SCHEME?

The Scheme will not apply to any Solicitor Member, Life Member or ILP Member who has applied for, and been granted, an exemption from participation in the Scheme. If a person has been granted an exemption it only applies whilst that person is a member or employee of the law practice that has applied for exemption on the solicitor's behalf.

Coverage under the Scheme is subject to or satisfying all Scheme participation requirements.

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all legal practitioners (that is, any person who holds a current practising certificate) within the law practice will need to be Members of the Society and participants in the Scheme.

**Incorporated Legal Practices** can now participate in the Scheme and enjoy the benefit of limiting occupational liability under the Scheme if they become an ILP Member of the Society. Should you require more information about ILPs please access further information [here](#).

For example, a law practice might have ten principals, nine of whom are participating in the Scheme, but the tenth principal is not a member of the Society and not participating in the Scheme. If a successful claim is made against the tenth principal, he or she might be liable for the full amount of the claim but could possibly be entitled to bring a contribution claim against all other principals to contribute to the balance of the claim which exceeds the monetary limit of the insurance policy held by the law practice. This would undermine the effectiveness of the limitation of liability.

Issues may also arise if an employee solicitor is not a member of the Society and the Scheme. If a claim is brought against the employee solicitor, the principal/s (as the

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employer) could be vicariously liable for the employee's act or omission committed in the course of employment, and might not be able to rely on the limitation of liability cap.

If you have a solicitor who is practising in your NSW practice under an interstate practising certificate, or a law graduate who does not hold a current practising certificate, it would be prudent for those individuals to apply for Associate Membership of the Society so as to avoid the risk of falling outside [s.18\(3\)](#) of the Act.

Therefore, law practices wishing to fully benefit from the limitation of liability provided by the Scheme should ensure that:

- All legal practitioners renew their membership of the Society and register their Scheme participation on an annual basis; and
- All new legal practitioners who join the law practice during the year should retain or immediately apply for membership of the Society and the Scheme.
- If the law practice is an ILP then the ILP entity should consider joining the Law Society as an ILP Member so it too can participate in the Scheme.

## WHAT IS THE COST FOR SOCIETY MEMBERS TO JOIN THE SCHEME?

### Solicitor Members

An annual participation fee of \$105.00 will be payable for each Solicitor Member or Life Member to participate in the Scheme.

This fee made up as follows:

- a) \$50.00 annual Professional Standards Council registration fee; and
- b) \$55.00 (\$50 + \$5 GST) Society administration fee.

### ILP Member Entity Fee

Only the annual Professional Standards Councils fee of \$50.00 is payable for an ILP to participate in the Scheme.

**Note:** The Society does not charge a fee for ILP Society Membership.

## WHAT ARE THE MONETARY CEILINGS FOR LIMITATION OF LIABILITY UNDER THE SCHEME?

The Scheme is intended to operate so as to limit the occupational liability of participating Scheme members for damages arising from a single cause of action to an amount of \$1.5 million, \$10 million or the specified higher maximum amount than would otherwise apply depending on the insurance policies, total revenue and the number of principals of the law practice of the Participating Scheme member, and to the extent that liability can be limited under the Act.

The monetary ceilings under the Scheme are set out in the Scheme Instrument as follows:

### Class 1 - \$1.5 million cap

*Participating Scheme 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.*

### Class 2 - \$10 million cap

- a) *Participating Scheme Members who were at the Relevant Time in a Law Practice consisting of more than 20 Principals; or*
- b) *Participating Scheme 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.*

### 3. Discretionary Higher Cap

Participating Scheme Members who, upon successful application, have a higher maximum amount of liability than would otherwise apply as specified by the Law Society.

## INCLUSIONS/EXCLUSIONS UNDER THE ACT

The Act provides that civil liability arising directly or vicariously from anything done or omitted by a Member covered by the Scheme acting in the performance of their occupation is covered to the extent permitted by the Act

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However, [s.5](#) of the Act specifically excludes coverage of liability arising from:

1. The death of or personal injury to a person; (Until the amendment pursuant to *Professional Standards Amendment Act 2004*, the Act also specifically excluded “any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim”. The amendment removed this exclusion for causes of action arising after 15 November 2004.);
2. a breach of trust;
3. fraud or dishonesty; or
4. liability, 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.

The limitation under the Scheme is a limitation of damages that may be awarded for a single claim arising out of a single event. Damages do not include defence costs.

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.

The Scheme covers acts or omissions that occur after the commencement of the Scheme.

### CAN A PARTICIPATING MEMBER CONTRACT OUT OF THE SCHEME FOR SPECIFIC CLIENTS OR MATTERS?

The Act prohibits contracting out of the Scheme. The Society, however, has a discretion to increase the monetary ceiling in accordance with clause 5 of the Scheme Instrument that provides:

### 5. Conferral of discretionary authority

*5.1 The Law Society Council has discretionary authority, on application by a Participating Member, to specify in relation to the Participating Member, a higher maximum amount of liability than would otherwise apply under the Scheme in relation to him or her either in all cases or in any specified case or class of case.*

*5.2 If, in the exercise of its discretion under clause 5.1, the Law Society Council has specified a higher maximum amount of liability than would otherwise apply under the Scheme in relation to a Participating Member, after satisfying itself that there is evidence of top up Professional Indemnity Insurance commensurate with the higher maximum amount of liability sought, then the maximum amount of liability in relation to that Participating Member is that higher maximum amount.*

### HOW DO I DISCLOSE MY SCHEME STATUS TO CLIENTS?

Under [s.33](#) of the Act, participating Scheme members will need to disclose their limited liability status. The Act and [clause 9](#) of the *Professional Standards Regulation 2019* (NSW) (the Regulation) prescribe the following form of disclosure notification:

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

The statement must be printed in a size equal to or greater than the face measurement of Times New Roman typeface in 8 point. A Participating Member (as defined) will not be able to rely on the Scheme to limit liability if, before the time at which the act or omission giving rise to the cause of action occurred, the Participating Member did not give or cause to be given to the client documents that carried the required disclosure notification.

The [Professional Standards Councils advise](#) that notification should appear on the following documents:

- The statement must appear on all materials that are or could be given to current or prospective clients by your participating members to promote themselves or their

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occupation. Examples include, but are not limited to:

- Letterhead and letters signed by the company or on its behalf
- Fax cover sheets
- Newsletters and other publications
- Your website(s)
- Written advice, plans, drawings, specifications and any other client documents not accompanied by a separate document with the disclosure statement
- Memorandum of fees and invoices unaccompanied by a separate document with the disclosure statement.

The statement does *not* need to appear on:

- Advertisements in print media, directory listings and similar forms of promotion
- Business cards
- Social media networks, blogs, etc. that are accessed voluntarily by consumers, rather than being given, or caused to be given, by professionals to their clients or prospective clients.

It is the responsibility of the principals of the law practice to ensure that the disclosure requirements are met. A failure to comply is a breach of s.33 of the Act.

### Variations on Disclosure Notification where the ILP entity has exempted from the Scheme

For an ILP where all principals and Australian legal practitioners are participating in the Scheme but the ILP entity itself has exempted from the Scheme, it would seem wrong to state that liability is limited by a scheme approved under professional standards legislation, when the liability of the ILP is not so limited.

Such a statement on correspondence from an ILP may be conceived as being in breach of sections 29(1)(m) and 151(1)(m) of the *Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cwlth))*. Those sections proscribe the making of a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy in connection with the supply or possible supply of goods or services or in connection with the

promotion by any means of the supply or use of goods or services.

Provided legal practitioners employed by an ILP are indeed persons to whom the Scheme applies in accordance with clause 3 of Scheme Instrument, the following expanded statement does not appear to contravene the Australian Consumer Law while still satisfying the requirements of Act.

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

### Legal practitioners employed by (name of ILP) are members of the scheme.”

**Important:** Please note that no variation on the prescribed disclosure notification is required where all the legal practitioners *and* the ILP entity are participating in the Scheme.

## MUTUAL RECOGNITION

The Scheme 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 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.

## WHAT IS THE SCHEME DURATION?

The Scheme was gazetted on 27 April 2018 and commenced on 22 November 2018. The Scheme has been approved for a period of five (5) years.

Applications for participation in, or exemption from, the Scheme are made annually and due by 21 November each year.

## DISCLAIMER

The information in this Frequently Asked Questions document regarding The Law Society of New South Wales Professional Standards Scheme is intended as a general guide only. The information is not intended to constitute professional or legal advice, and you should make your own enquiries and assessment. The Law Society of New South Wales expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this Frequently Asked Questions document.