

THE LAW SOCIETY OF NSW

PROFESSIONAL STANDARDS SCHEME

Improving standards. Reducing risk.



THE LAW SOCIETY
OF NEW SOUTH WALES

INTRODUCING THE SCHEME	1
What is the Professional Standards Scheme?	1
Incorporated Legal Practices and the Scheme	4
Liability caps	4
Mutual recognition	6

ADMINISTERING THE SCHEME	7
Requirement to make an application	7
Applying to participate	8
Applying to exempt	8
Participation fees	8
Practitioner maintenance	9

COMPLYING WITH THE SCHEME	10
Disclosure notification requirements	11
Professional indemnity insurance requirements	12
Risk management requirements	12

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 September 2021.



INTRODUCING THE SCHEME

What is the Professional Standards Scheme?

The Professional Standards Scheme (**the Scheme**) is a legal instrument, established under the *Professional Standards Act 1994* (**the Act**) and approved by the Professional Standards Councils.

The statutory objectives of the Scheme are reciprocal in nature:

- It binds The Law Society of New South Wales (as the occupational association for the solicitor branch of the legal profession in NSW) to monitor, enforce and improve the professional standards of its Members, and protect consumers of professional services; and
- Serves to cap the civil liability or damages the Law Society's Scheme participants may be required to pay if a Court upholds a claim against them.

How does the Scheme operate?

In principle, if proceedings are brought against a Scheme participant relating to occupational liability for damages arising from a single cause of action, and the Scheme participant is able to 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 the requisite professional indemnity insurance (**PII**) cover 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 liability cap specified in the Scheme,

the Court, in awarding damages, will limit those damages to the relevant liability cap specified in the Scheme.

How is the Scheme different to Professional Indemnity Insurance?

The Scheme is not an insurance product and does not affect the requirement to obtain insurance through Lawcover (NSW), or otherwise, as applicable. However, Scheme participants who have insurance coverage equal to an amount not less than the applicable liability cap may limit their civil liability in the event of a relevant claim.

Who does the Scheme apply to?

Subject to meeting all Scheme requirements, the Scheme applies to:

- a) Solicitor and Life Members of the Law 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 Law Society who are not excluded or exempted from the Scheme;
- c) Incorporated Legal Practice (**ILP**) Members of the Law Society that are eligible under the terms of the Scheme Instrument and have not been exempted from the Scheme;
- d) Officers or employees of ILPs that are Members of the Law 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.

(Ss. 17-20A Professional Standards Act 1994)



What is covered by the Scheme?

The Scheme provides for limitation of occupational liability arising from a single cause of action. 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.

The Scheme does not provide absolute protection from occupational liability due to the operation of section 5 of the Act which 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*.

Incorporated Legal Practices and the Scheme

As a legal entity in its own right, an ILP can now become an ILP Member of the Law Society. An ILP Member may also avail itself of the Scheme benefits, provided all the legal practitioners are Solicitor or Life Members of the Law Society.

Why add the ILP entity as a participant as well as its legal practitioners?

If only the legal practitioners in an ILP are able to limit their liability under the Scheme, then both the ILP entity and the legal practitioners who are directors of the ILP would be exposed to the risk of a claim exceeding any liability cap the individual legal practitioners applied for under the Scheme.

The Law Society's Constitution provides that an ILP entity qualifies to be an ILP Member of the Law Society if all of its principals and Australian legal practitioners who are recorded by the Law Society as having their principal place of practice in New South Wales, are either Solicitor Members or Life Members.

Liability Caps

Law practices that wish to avail themselves of the Scheme must select either the \$1.5 million liability cap (**Class 1**) or the \$10 million liability cap (**Class 2**), depending on what is appropriate for the law practice, having regard to its business structure, risk, clients and legal services it provides.

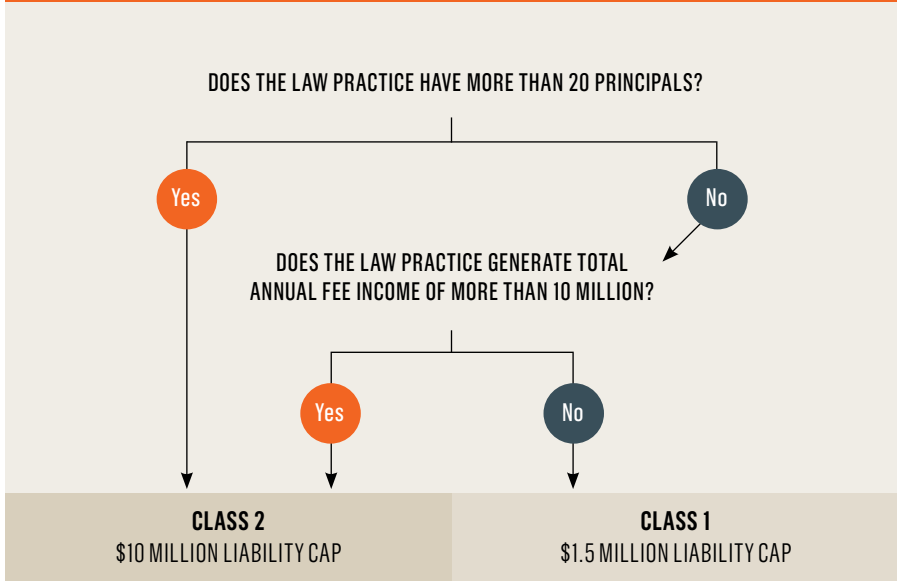
Evidence of Top Up Insurance is required for a liability cap above \$1.5 million. It is important to speak with your insurer directly about the requirements of Top Up Insurance and how it might work for your particular circumstances.

Can I tailor my Scheme participation to suit my business and risk management needs?

The Act bestows upon the Council of the Law Society a discretionary authority, on application by a participating law practice, to specify a higher liability cap than would otherwise apply under the Scheme in respect of all cases, a class of case, or a specified case.

We call this a Discretionary Higher Cap (**DHC**).

WHAT IS THE APPROPRIATE LIABILITY CAP FOR MY LAW PRACTICE?



When could a Discretionary Higher Cap benefit my law practice?

In deciding whether or not a DHC is appropriate for your law practice, consideration might be given to the circumstances, business and client requirements of the law practice. If you answer yes to any of the questions below, please call our team on 9926 0189 who can assist you.

Do you tender, or wish to tender for Government contracts?

Are there prospective clients who might be willing to retain your services if you have a higher liability cap?

Would implementing a higher liability cap serve as a positive risk management strategy without limiting your ability to:

- Attract different clients; or
- Act for existing clients on larger matters?



Mutual Recognition

The Law Society and the Professional Standards Councils recognise that the provision of legal services transcends state boundaries, particularly in the current fast changing legal practice landscape. The Scheme Instrument provides for mutual recognition across Australia.

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 your law practice engages in legal practice 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.



ADMINISTERING THE SCHEME

Requirement to make an application

In order to administer the Scheme so as to meet all of the Professional Standards Councils' requirements, and in accordance with the Act, all Solicitor Members, Life Members and Incorporated Legal Practice Members of the Law Society are required to either apply for registration of participation in, or exemption from, the Scheme. The Law Society administers this participation and exemption process through the relevant law practice.

Applications to be made by the Scheme Co-ordinator

For administrative purposes, the Law Society requires a principal (as defined in the *legal profession legislation*) of each law practice to be the responsible Scheme Co-ordinator and make applications on behalf of the law practice and its legal practitioners.

The principal must ensure that they are authorised to apply for either participation in, or exemption from, the Scheme for all legal practitioners in their law practice after discussion with the practitioners about the Scheme.

Failure to notify of law practice changes can affect your Scheme coverage.

Government COVID-19 restrictions to on-site staffing have impacted processing time for hard copy applications and cheque payments.

Please consider making your application online this year.

Call one of our friendly team on 9926 0189 if you need help.

Applications for participation in the Scheme

Law Practices

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 and participate in the Scheme.

Incorporated Legal Practices

If your law practice is an ILP, and the ILP entity (as opposed to the legal practitioners within the ILP) wishes to enjoy the benefit of limiting its occupational liability under the Act by participating in the Scheme, it must be an ILP Member of the Law Society.

Applications for exemption from the Scheme

For those law practices that do not wish to participate in the Scheme, an application for exemption must be made in respect of all Law Society Members within the law practice. The Professional Standards Councils requires the Law Society to maintain a register of its Members who have been granted exemption from the Scheme.

Please note that an exemption will be recorded as effective for the duration of the Scheme year or until a subsequent application for participation is made.

Participation Fees

	PROFESSIONAL STANDARDS COUNCILS FEE	LAW SOCIETY ADMINISTRATION FEE	TOTAL ANNUAL FEE
Per Solicitor Member and Life Member	\$50.00	\$55.00*	\$105.00
Incorporated Legal Practice (entity) Members	\$50.00	Nil	\$50.00

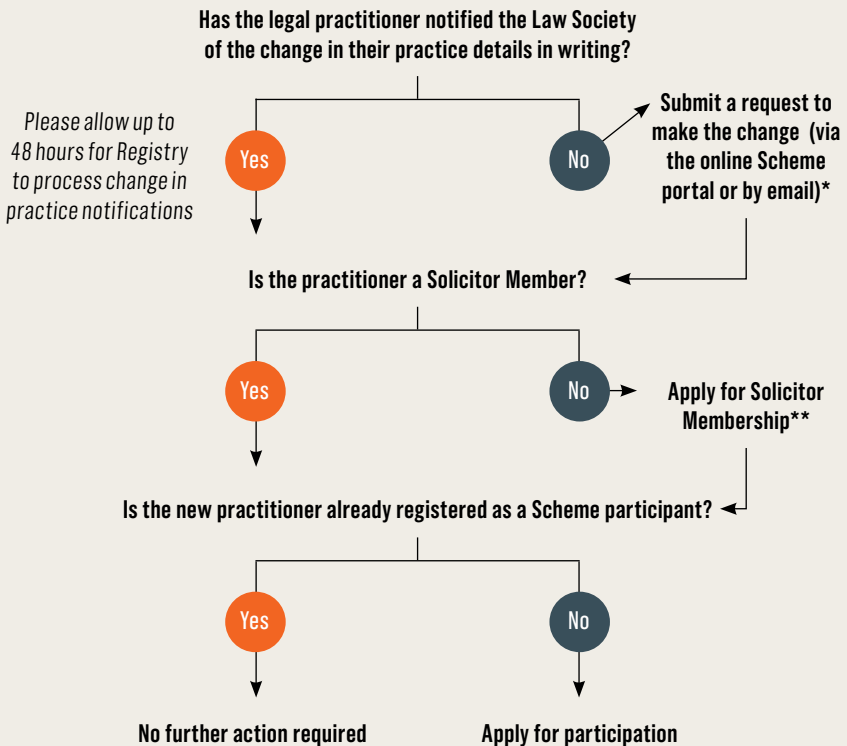
* Inclusive of \$5.00 GST

Practitioner maintenance during the Scheme year

Participating Law Practices

For a law practice to rely on the Scheme, each of its insurable legal practitioners must be Solicitor Members or Life Members of the Law Society and participating in the Scheme.

WHAT TO DO WHEN A NEW LEGAL PRACTITIONER JOINS A PARTICIPATING LAW PRACTICE



* Your Scheme Co-ordinator can check on the new practitioner's Law Society membership and Scheme status via the online Scheme portal or by emailing the Scheme Administration Team at scheme@lawsociety.com.au

** An application for Solicitor Membership of the Law Society may be made either online or by hardcopy. For more information please visit: lawsociety.com.au/Membership



COMPLYING WITH THE SCHEME

To maintain our Scheme's accreditation with the Professional Standards Councils, the Law Society must demonstrate that it adequately monitors, regulates and improves the professional standards of its Members.

Disclosure Notification Requirements

The *Professional Standards Act 1994* and the *Professional Standards Regulation 2019* require Scheme participants to disclose their limited liability status. The following disclosure notification is permitted and prescribed:

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

The statement must be printed in a size not less than that of Times New Roman 8 point font.

The Professional Standards Councils have directed that the disclosure notification must appear on all materials that are or could be given to current or prospective clients by Scheme participants to promote themselves or their occupation.

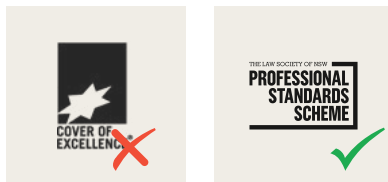
Disclosure notification should appear on:

- 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

The Law Society of New South Wales Professional Standards Scheme Logo

The Professional Standards Council's Cover of Excellence®

logo is obsolete and its use is not permitted under the current Scheme and can not be used by a law practice at all. The Law Society has developed its own Professional Standards Scheme logo which you are welcome to use on your letterhead, emails and websites and other law practice documentation whilst participating in the Scheme. Please note that this logo is optional and does not replace the disclosure notification.



Professional Indemnity Insurance Requirements

Professional Standards Legislation and the Scheme require all participants to have professional indemnity insurance to an amount no less than the applicable liability cap (monetary ceiling) set out in the Scheme Instrument. This level of insurance must be maintained throughout the Scheme year.

Risk Management Requirements

Scheme participants are expected to demonstrate their commitment to high professional standards by implementing policies and processes within their law practices to:

- 1 **Identify the risks** in providing legal services
- 2 **Implement strategies** to mitigate those risks
- 3 **Ensure compliance** with the *legal profession legislation*
- 4 **Reduce exposure** to claims and complaints



For more information on Scheme compliance requirements, please visit lawsociety.com.au/scheme.

THE LAW SOCIETY OF NSW

PROFESSIONAL STANDARDS SCHEME

For further information please visit
lawsociety.com.au/scheme

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney

ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 E lawsociety@lawsociety.com.au

lawsociety.com.au

