

FREQUENTLY ASKED QUESTIONS

THE LAW SOCIETY OF NSW

**PROFESSIONAL
STANDARDS SCHEME**

What is the Law Society's Professional Standards Scheme?

The Law Society's Professional Standards Scheme (**Scheme**) is a legal instrument as approved by the Professional Standards Councils. It is established under the *Professional Standards Act 1994 (NSW) (Act)*. Pursuant to the Scheme and the Act, the Law Society of New South Wales (**Law Society**) monitors, enforces and facilitates the improvement of the professional standards of its Members which is designed to protect consumers of professional services.

The Law Society has demonstrated to the Professional Standards Council that it represents a professional community that can protect consumers and meet high levels of professionalism and as such its Scheme has been approved.

The Scheme commences on 22 November 2024 and is due to expire on 21 November 2029.

What does the Scheme do?

The Scheme caps the liability of persons participating in the Scheme (**Participating Member**) if a court upholds a claim against them.

Under the Act, the Scheme provides for limitation of occupational liability arising from a single cause of action to the extent to which the liability results in damages exceeding the amount of the cap specified in the Scheme. The Scheme covers acts or omissions that occur after the commencement of the Scheme.

The Act defines: "*occupational liability*" to mean 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 does the Scheme work?

In principle, if proceedings are brought against a Participating Member relating to occupational liability for damages, and the Participating Member is able to show that:

- a) the Participating 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 Member is not able to satisfy the Court that;

- a) they have the requisite insurance cover; or
- b) the amount payable under the PII policy is no less than the relevant monetary ceiling specified in the Scheme Instrument, then they will not be entitled to rely on the Scheme to limit liability for damages.

Who can participate in the Scheme?

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

- a) A Solicitor Member (including a Life Member) who is not excluded or exempted from the Scheme;
- b) An ILP that is itself an ILP Member of the Law Society that is not excluded or exempted from the Scheme;
- c) Partners and employees of Solicitor Members and Life Members of the Law Society who are not excluded or exempted from the Scheme;
- d) Officers or employees of law practices that are Members of the Law Society and who have not been excluded or exempted from the Scheme.

In addition, all persons to whom the scheme applied when the act or omission giving rise to the relevant cause of action, also have their occupational liability limited.



THE LAW SOCIETY
OF NEW SOUTH WALES

What is an ILP Member of the Law Society

An ILP as defined by s 6 of the *Legal Profession Uniform Law (NSW)*, is a legal entity in its own right. Pursuant to Clause 6.2.5 of the Constitution of The Law Society of New South Wales, an ILP is qualified 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 Solicitor Members.

Under the current Scheme, due to commence 22 November 2024, pursuant to Clause 6.2.5 of the Law Society's Constitution, Clause 3.1.2 and Clause 1.2 of the Scheme Instrument, for an ILP to gain the full benefit of the Scheme and the limitation of liability, it will need to be an ILP Member, and ensure 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 Solicitor Members.

What is the cost for Law Society Members to join the Scheme?

Solicitor Members

An annual participation fee of \$105.00 is 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 Fee

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

Note: The Law Society does not charge a fee for ILP Law 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 Members for damages arising from a single cause of action to an amount of \$1.5 million, \$10 million, or a higher maximum amount specified by the Law Society. The ceiling that applies is determined in accordance with the current Scheme and depends on the PII, total revenue and the number of principals of the law practice 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 Monetary ceiling (Maximum amount of liability)

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 \$10 million.

Class 2 - \$10 million Monetary ceiling (Maximum amount of liability)

- 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 \$10 million.*

Discretionary Higher Cap

Participating Members who, upon successful application, can be granted a higher maximum amount of liability than would otherwise apply under the Scheme.

Inclusions/exclusions under the Act

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

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

1. The death of or personal injury to a person;
2. a breach of trust;
3. fraud or dishonesty; or
4. 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.

Damages do not include defence costs.

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

Aggregation of claims

The Scheme limits those damages that may be awarded for a single claim arising out of a single event.

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.

Can a participant contract out of the Scheme for specific clients or matters?

The Act prohibits contracting out of the Scheme. The Law Society, however, has a discretion to increase the monetary ceiling in accordance with clause 5 of the Scheme Instrument (as explained above under the heading “Discretionary Higher Cap”)

How do I disclose my Scheme status to clients?

If the occupational liability of a person is limited under the Scheme, s 33(1) of the Act prescribes that all documents given by the person to a client or prospective client that promote or advertise the person or person’s occupation, including official correspondence ordinarily used by the person in the performance of the person’s occupation and similar documents, must carry a statement to that effect.

[Clause 9](#) of the *Professional Standards Regulation 2024* (NSW) (**Regulation**) prescribes the following form of disclosure notification:

Liability limited by a scheme approved under Professional Standards Legislation.

The prescribed statement must be printed in a size equal to or greater than the face measurement of Times New Roman typeface in 8 point. Failure to comply with the notification of limitation of liability requirements set out in s 33 of the Act is an offence and breach of the legislation, and the Scheme could be challenged in court. In some states and territories, this could jeopardise your access to limited liability under the Scheme.

The Professional Standards Councils advise that notification should appear on all materials that are or could be given to current or prospective clients by Participating Members to promote themselves or their 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
- Emails
- 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 a law practice to ensure that the disclosure requirements are met.

A failure to comply is a breach of the Act and attracts 50 penalty units.

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) when the relevant act or omission occurred and where the act or omission occurred in the State or Territory that has recognised the Scheme. The Professional Standards Councils guidance note regarding Mutual recognition may be accessed [here](#).

Why must Solicitor, Life and ILP Members of the Law Society register participation in, or apply for exemption from the Scheme?

Solicitor Members, Life Members and ILP Members are required to either register participation in, or apply for exemption from, the Scheme annually, in advance of the Scheme year commencing (22 November – 21 November). The Law Society administers this participation and exemption process through the relevant law practice.

Coverage under the Scheme is subject to, or satisfying, all Scheme participation requirements. For a law practice to have all its employees, officers and partners to be covered by the Scheme, all persons who are eligible to become members of the Law Society should become members so that they are also covered by the Scheme.

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 Law Society and, by reason of s 18(3) of the Act is 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 Law Society and the Scheme. If a claim is brought against the employee solicitor, the principal/s (as the 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 the employee is not a participant of the Scheme.

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

- all officers, employees and partners of the law practice who are eligible for Solicitor membership of the Law Society should become Solicitor Members of the Law Society by 30 June of each year and all Solicitor Members should be registered as participants of the Scheme on an annual basis; and
- any officers, employees or partners that join the law practice during the year who are eligible for Solicitor membership of the Law Society should retain or immediately apply for Solicitor membership and all Solicitor Members registered as Scheme participants for the balance of that year.

Who is exempt from the Scheme?

The Scheme will not apply to any Solicitor Member, Life Member or ILP Member (as defined in the Scheme Instrument) 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.

How is the Scheme different to professional indemnity insurance?

The approved Scheme is an insurance-based Scheme (see s. 21 of the Act).

At the time of registration of participation in the Scheme, the Law Society requires all Scheme participants to provide:

- a) evidence of PII (of a kind which, at the time of the act or omission giving rise to the Occupational Liability, complies with the standards then determined by the Council of the Law Society of New South Wales); and
- b) certification that their law practice has sufficient business assets to cover any PII excess, payable in the event of a claim.

For those Scheme applicants who seek a cap higher than \$1.5M they must provide evidence of top up PII that:

- 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.

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.