

# Public consultation document

The Law Society of Western Australia has prepared a Professional Standards Scheme under *Professional Standards Act 1997 (WA)*.

Each state and territory have professional standards legislation to:

- protect consumers of professional services and other occupational services
- improve occupational standards
- allow scheme participants to limit their civil liability.

The Professional Standards Council of Western Australia invites public comments and submissions on our scheme by Wednesday 17 January 2024.

Your comments will provide valuable insight into how consumers view and understand our proposed scheme. This will help the Council decide whether to approve the scheme or not. If Council approves the scheme, it will then need the relevant attorney-general or minister's authorisation.

This document covers:

1. The Law Society of Western Australia and our members
2. Our proposed scheme
3. The benefits of our scheme
4. Comments and submissions.

1. The Law Society of Western Australia and our members

Who is the Law Society of Western Australia?

The Law Society of Western Australia (The Society) is the professional association for legal practitioners in Western Australia. The Law Society is legally incorporated under the *Associations Incorporation Act 2015 (WA)* and is governed by a Council of 17 members elected in accordance with its Constitution.

The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. The Law Society is a not-for-profit association dedicated to the representation of its members and to the enhancement of the legal profession through being a respected leader and contributor on law reform, access to justice and rule of law.

- **Our vision** is to be the **essential** membership for the legal profession.
- **Our mission** is to deliver strong advocacy, high-value networking, education and support services for the Western Australian legal profession.
- **Our purpose** is to be the **voice** of the legal profession in Western Australia.

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- **Our strategic imperatives** are:
  1. To be an *influential voice*, enabling members and community to stay informed and represented.
  2. To be an *essential support to legal professionals*, empowering them to do their best work.
  3. To be a *central point for connections across the profession*, industry, and community.

Who are our members?

The Law Society's members include Ordinary Members, Constituent Members, Associate Members, Judicial Members, Life and Honorary Members and Incorporated Legal Practices. Only Ordinary Members and Life Members have the right to vote at a general meeting of the Law Society and represent 80% of total members.

Ordinary membership of the Law Society is available to Australian Legal Practitioners as defined in the *Legal Profession Uniform Law Application Act 2022 (WA)*, and who hold a practicing certificate issued by the Legal Practice Board.

All practitioners must be covered by approved professional indemnity insurance prior to joining the Scheme.

What types of work do our members do?

The Society has a strong network of over 4,500 members from the Western Australian legal profession. Our members are composed of legal practitioners in many areas and expand to senior lawyers, early career lawyers, student and graduates, barristers, associate members, judiciary, and firm managers. Additionally, over 250 of our members have shaped the Law Society's advocacy by sitting on over 30 committees and contributing submissions to Council.

## 2. Our proposed scheme

What is a professional standards scheme?

The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations.

The legislation is state based, and the relevant Act in Western Australia is the *Professional Standards Act 1997 (WA)* (the Act). The relevant regulations in Western Australia are the *Professional Standards Regulations 1998 (WA)* (the Regulations).

For a scheme to be approved under the Act, occupational associations such as the Society are required to demonstrate a high commitment to professional standards and consumer protection and implement comprehensive risk management strategies.

An approved scheme will limit the occupational liability of participants to selected amounts, provided that they meet the scheme's requirements, subject to the scheme itself and the Act.

Schemes are approved by the Professional Standards Councils (PSC). The PSC were established by the Australian state and territory governments and are the independent statutory bodies responsible for promoting professional standards and consumer protection across Australia. For more information about the PSC and their functions, please see their website at <https://www.psc.gov.au/about-us>.

What is the Law Society of Western Australia scheme?

The Law Society of Western Australia administers the Professional Standards Scheme (the Scheme) as an exclusive benefit for its members.

The Scheme is designed to promote professional standards within the profession and enhance consumer protection by allowing participating members to cap their occupational liability to an amount of \$1.5 million, \$5 million or \$10 million depending on the insurance policies and total annual fee income of the law practice.

How does the scheme operate?

The Scheme, run by the Society, is a benefit for consumers as it:

- encourages and facilitates a higher professional standard and improved risk management practices;
- facilitates education of and communication with members about strategies and practices to limit professional liability risk;
- ensures that members are correctly insured, which is a necessary pre-requisite for gaining limited liability.

Participants of the Scheme must ensure that they disclose their participation and ensure that the prescribed disclosure statement is contained on all documents provided to clients or prospective clients that promote or advertise the practice.

Who administers the scheme?

The responsibility for administering the Scheme and ensuring compliance with the requirements of the Act and the Professional Standards Councils (PSC) rests with the Law Society Council, the Chief Executive Officer, the General Manager, Corporate Services, and the Professional Standards Scheme Co-ordinator.

Where does the scheme operate?

The Scheme applies in Western Australia. In addition to Western Australia, the Scheme is intended to operate in New South Wales, Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory in accordance with the professional standards legislation of those states and territories and subject to the requirements of that legislation ('the Corresponding laws'), so that references to a provision of the Act, the application of the Scheme to a liability, the limit of a liability under the Act or what constitutes Occupational liability are intended to pick up the relevant provisions of the corresponding laws, applied mutatis mutandis, to the extent that is necessary for the application of the Scheme in any of those jurisdictions as an interstate scheme.

When will the scheme apply?

The Law Society has administered a Scheme continuously since 1 July 2014.

The specified date for the new Scheme is 1 July 2024 and remain in force for a period of five (5) years from its commencement. The Scheme is not retrospective. It applies to practitioners at the date they join the Scheme and ongoing protection applies only for the time a practitioner remains within the Scheme by renewing their Law Society membership and Scheme participation annually.

Does the scheme apply to all members?

The Scheme applies to:

1. All Ordinary Members and Life Members of the Society who hold an Australian Practising Certificate, who are not a Corporate Legal Practitioner or a Government Legal Practitioner, and who are not exempted under clause 2.2 of the Scheme;
2. Incorporated Legal Practice Members that are not exempted under clause 2.3 of the Scheme; and
3. All persons to whom, by virtue of sections 31, 32 or 33 of the Act, the Scheme applies.
4. A person referred to in Clause 2.1 may, on application, be exempted from the Scheme from the date specified by the Law Society WA. This clause does not apply to persons to whom the Scheme applies by virtue of sections 31,32 or 33 of the Act.

How are participating members' level of limited liability determined?

The Scheme will limit the occupational liability of Participating Members for damages arising from a single cause of action to an amount of \$1.5 million, \$5 million or \$10 million depending on the insurance policies and total annual fee income of the law practice of the Participating Member, and to the extent that liability can be limited under the Act.

The ceiling on liability under the Scheme is in accordance with the following table:

<b>Tier</b>	<b>Description</b>	<b>Monetary ceiling (Maximum amount of liability)</b>
1	Participating Members who were at the Relevant Time in a Law Practice that generated a Total Annual Fee Income for the financial year immediately preceding the Relevant Time up to and including \$5 million	\$1.5 million
2	Participating Members who were at the Relevant Time in a Law Practice that generated a Total Annual Fee Income for the financial year immediately preceding the Relevant Time of more than \$5 million and up to \$10 million	\$5 million
3	Participating Members who were at the Relevant Time in a Law Practice that Generated a Total Annual Fee Income for the financial year immediately preceding the Relevant Time of more than \$10 million	\$10 million

The Scheme confers discretionary authority on the Council to specify a higher maximum amount of liability than would otherwise apply under the Scheme. The discretion can be for a specified case, a class of case or in all cases subject to any terms or conditions under the Act or the Scheme.

Can a Law Society of Western Australia member leave the scheme?

Participation in the Scheme is not compulsory. A person referred to in Clause 2.1 of the Scheme may, on application to the Society, be exempted from the Scheme from the date specified by the Society. This clause does not apply to persons to whom the Scheme applies by virtue of sections 31,32 or 33 of the Act. Applications for exemption can be found on the Society's website. Exemptions are granted

where a practitioner cannot limit their occupational liability under the Scheme and wishes to remain a Law Society member. A member who is exempted from participation in the Scheme will not gain the benefit of a limitation of liability under the Scheme in the event of a claim.

How will consumers know if a Law Society of Western Australia member is covered by the scheme?

All Scheme participants are required to disclose on all materials that are or could be given to current or prospective clients that their liability is limited under a Professional Standards Scheme. The disclosure must comply with the form of statement prescribed in clause 6 of the Professional Standards Regulations 1998 (WA).

New Scheme participants are informed of their statutory obligation, under section 45(2) of the Act, to comply with the disclosure statement requirement.

Any breaches of the above are referred to the Professional Standards Council.

### 3. The benefits of our scheme

How will consumers benefit from the scheme?

The benefit to consumers of the Scheme is an assurance that the professional standards of Scheme participants meet those required by the Law Society, the legal profession legislation, and the Professional Standards Council, ensuring that the consumers are represented by responsible legal practitioners.

Legal practitioners are required to be covered by professional indemnity insurance, to ensure that consumers of legal services receive timely and fair compensation for legitimate claims.

The Law Society has implemented a number of strategies to enhance the professional standards of the Scheme participants, of which include Risk Management strategies. The Law Society has adopted a Five Year Risk Management Plan and a Risk and Compliance Framework, which identifies the risks to professional standards, the causes of the risks and control implemented by the Law Society to mitigate the risks.

Law Mutual (WA) provides a series of risk management seminars to assist practitioners in managing professional liability risks, including the publication of Practice and Matter Management Guidelines. These documents are available to Law Society members who participate in the Scheme.

How does the scheme enhance our members' occupational standards?

Being recognised with a Professional Standards Scheme does more than simply limit members civil liability.

It also shows that your association and its members are a genuine professional community – one that's committed to delivering ongoing improvements in professional standards and consumer protection.

The Scheme is designed to promote professional standards within the profession and enhance consumer protection. Participants of the Society's Scheme are expected to take active steps in order to monitor their professional standards and continue to improve in the below areas at minimum.

#### 1. Disclosure of Scheme Participation

Firms must ensure the prescribed disclosure statement is contained on all documents provided to clients or prospective clients that promote or advertise the practice.

## 2. Maintain Sufficient Insurance Cover

To rely on the Scheme, Participating Members need to demonstrate that they have the benefit of an insurance policy that provides the requisite cover for an amount not less than their relevant liability cap.

## 3. Report Claims

The PSC require that we immediately report to them any claims against Scheme participants that are approaching their relevant cap. If participants have a claim that meets this criteria, it is important that they inform us as soon as possible.

### **Additional steps**

## 4. Implement Risk Management Practices

As part of the Law Society's role in providing insurance through Law Mutual, Law Mutual's mandate is to assist insured practitioners and practices (Insureds) to manage the risk of professional liability for errors and omissions in the provision of legal services to their clients. Law Mutual does this by encouraging Insureds to foster a culture that values risk management, and by providing targeted risk management seminars that clearly demonstrate how issues arise, and further, assist practitioners to put in place systems and processes that minimise professional risk.

## 5. Quality Practice Standard (QPS) Accreditation

The QPS recognises firms that have developed and adhere to documented internal processes designed to improve client satisfaction and avoid wastage. QPS law firms show that they comply with standards which go beyond the requirements set out by legislation. Firms complying with QPS can use the Approved Quality Practice logo on their letterheads and promotional material.

QPS approved legal practices are entitled to a 7% discount for the first year on professional indemnity insurance premiums, and 5% discount thereafter.

How does limiting participant liability help consumers?

Consumers are entitled to approach the court with claims for damages against professional service providers who have failed to discharge their duties properly.

But if their professional service provider is inadequately insured, consumers can end up missing out on any compensation awarded by the court, while still having to pay court costs and other expenses.

Professional Standards Schemes benefit consumers by:

- encouraging and facilitating a higher professional standards and improved risk management practices;
- Education of and communication with members about strategies and practices to limit professional liability risk;
- ensures that members are correctly insured, which is a necessary pre-requisite for gaining limited liability.

Is the scheme a professional indemnity insurance scheme?

The Scheme is not an insurance product and does not affect a practitioner's requirement to obtain insurance through Law Mutual (WA), or otherwise as applicable. Compulsory professional indemnity insurance must cover the amount up to the liability cap. Note, however, that the liability cap under the

Scheme relates only to damages and does not include costs. The professional indemnity insurance scheme run by Law Mutual (WA) includes defence costs as well as damages up to \$2 million.

Members should seek their own advice regarding top-up insurance. Top-up insurance will be required if the liability cap applicable is more than \$1.5 million. Top-up insurance is not available through Law Mutual (WA).

What continuing education can members access?

Continuing Professional Development, also known as CPD, is highly important for professionals in all occupations and is a requirement for legal practitioners in Western Australia. Engaging in life-long learning is essential for developing and maintaining professional competency, and benefits both the legal practitioner and client directly whilst also safeguarding the integrity of the profession. CPD is a fundamental part of the legal profession's commitment to maintaining high standards and ensuring public confidence in the services delivered by legal practitioners.

The Law Society is a leading provider of CPD to the Western Australian legal profession. Our unrivalled programme connects members with leaders in the profession, judiciary, and academia. The Law Society's focus remains to provide an outstanding educational experience tailored to the needs of local practitioners. Our seminars, webinars, online learning, workshops, and forums are informative and practical, providing members with information that can be used in day-to-day practice, mitigate occupational risks, and provide unparalleled networking opportunities. Membership fees include CPD free of charge with CPD Freedom, if a practitioner joins or renews by 31 July. By actively taking part in the Law Society's CPD programme, legal practitioners are:

- Promoting competence, capability, and compliance with professional obligations,
- Gaining valuable and up-to-date knowledge, information and tools that encourage best practice, promote self-assessment, and mitigate occupational risks,
- Showing consumers and others in the profession that they are innovative and responsive to change,
- Supporting a fully informed profession and community,
- Pursuing an improved professional standard that benefits themselves as a practitioner and protects clients, the courts, and the community, who can feel assured of the competence of the profession.

How are complaints and discipline managed?

As of 1 July 2022, the *Legal Profession Uniform Law Application Act 2022* (WA) established the Legal Services and Complaints Committee (the LSCC). The Scheme acknowledges that going forward, the LSCC is an independent statutory committee under the Legal Profession Uniform Law that ensures ethical conduct and professional behaviour in the legal profession. The functions of the LSCC under the Act are:

- a) to provide for the discipline of the legal profession... in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
- b) to promote and enforce the professional standards, competence, and honesty of the legal profession; and
- c) to provide a means of redress for complaints about lawyers.

The LSCC handles all complaints about solicitors and barristers in Western Australia and enquires into complaints and other conduct concerns in respect of legal practitioners.

The Society's Chief Executive Officer and/or Scheme Manager regularly liaises with the Board Executive Director and the LSCC staff, including for the purpose of monitoring and ascertaining the nature of matters arising in paragraphs (a) to (c) above.

#### 4. Comments and submissions

How can I make a comment or submission?

In your submission, you may wish to respond to the following questions:

- Are you a member of the Law Society of Western Australia (the Society)?
- Are you already a consumer of the type of services covered by the proposed scheme?
- Do you think the scope of the scheme is clear? (including work, jurisdictions and membership classes covered)
- Is it clear how you, as a member or consumer, could make a complaint?
- Can you describe how consumers would benefit from the Society's members' services being covered by a scheme?

Please send comments and submissions (preferably as a letter) to:

The Chief Executive Officer  
Professional Standards Councils  
Level 2, St James Centre  
111 Elizabeth Street  
Sydney NSW 2000.

You can also contact the Councils by:

- email: [pscinfo@psc.gov.au](mailto:pscinfo@psc.gov.au)
- phone: 1300 555 772 or (02) 8315 0800
- website: [www.psc.gov.au](http://www.psc.gov.au).

How are comments and submissions managed?

The Council must consider all comments and submissions it receives, in line with the public consultation process under the Professional Standards Act 1997 (WA), Part 3, Division 1, Sub-Section 23(1)(a).

Comments and submissions will be:

- made public unless you request confidentiality.
- subject to the Privacy Act 1988 (Cth).

Where can I find out more?

To find out more about The Law Society of Western Australia and our proposed professional standards scheme, please contact: [pss@lawsocietywa.asn.au](mailto:pss@lawsocietywa.asn.au)