

Professional Standards Scheme

Frequently Asked Questions

What is a Professional Standards Scheme?

A statutory scheme under the *Professional Standards Act 1997 (WA)* (Act) that is approved by the Professional Standards Council and creates a liability cap on damages that can be recovered by a plaintiff in a professional negligence action taken against a Participating Member of the Scheme.

What is the benefit of the Scheme?

The Scheme provides Participating Members the benefit of:

- limitation of liability for damages;
- the opportunity to reduce insurance costs

Does the Scheme affect a practitioner's requirement to obtain compulsory insurance?

No. 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.

Is top-up insurance still needed?

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 is the Law Society's Scheme Insurance Standard?

The Law Society has implemented an Insurance Standard in the interests of members and consumers of legal services to ensure the quality, consistency, and level of insurance of the legal practices of their members with reference to the requirements of the new Professional Standards Scheme.

The Society's Insurance Standard is available at lawsocietywa.asn.au.

Clause 4.2 of the Law Society's Professional Standards Scheme document requires that if a participating member of the Scheme seeks to rely on the Scheme to limit liability in the event of a claim, then they must have the benefit of an insurance policy insuring them against the occupational

liability to which the cause of action relates, and that the amount payable under the policy or policies in respect of that occupational liability is not less than the amount of the limit of liability.

If your practice falls within the Tier 2, Tier 3 or intends on making an application for a Higher Maximum Amount limitation of liability, we draw your attention to clause 3 (c) of the Insurance Standard.

Clause 3 (c) provides that if your top up insurance cover is defence costs inclusive, then you must ensure that the top up insurance policy limit provides for an aggregate cover that is at least \$500,000.00 more than your practice's limit of liability under the Scheme.

For example:

If you have a \$5M limitation of liability under the Scheme, then you would require a top up insurance limit of \$3.5M under this scenario to ensure that, as far as possible, the limit of liability can be paid from the insurance cover even where substantial defence costs have been paid out.

Can ILPs be members of the Law Society?

Yes. An ILP, the legal practitioner directors of which are Ordinary members of the Law Society, is entitled to become a member of the Law Society.

To gain the full benefit, must all eligible members of a law practice be members of the Law Society?

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all eligible persons providing legal services, including, but not limited to all legal practitioners (that is, persons who hold a current Australian practising certificate) within the law practice, and the law practice itself if it is an ILP, would need to be members of the Law Society.

How do members notify the Law Society of participation?

Society members are able to notify the Law Society of their participation by submitting a Professional Standards Scheme Participation Information form.

What if I do not wish to participate in the Scheme?

This is an 'opt-out' Scheme, which, subject to the provisions of the Act, applies to Law Society members. However, the Scheme provides for members to whom the Scheme applies to seek exemption by making an application to the Law Society. Members seeking exemption should refer to clause 4 of the Scheme and sections 30 to 34A of the Act.

Does the Scheme cover all types of legal work?

Although most legal work is covered, under the Act a Professional Standards Scheme does not apply to:

- a breach of trust,
- fraud or dishonesty,
- liability which may be the subject of proceedings under Part XII of the *Transfer of Land Act 1893*, or
- damages arising from the death of, or personal injury to a person.

The Act does not operate to exclude liability for damages arising out of any negligence or other fault of a Legal Practitioner in acting for a client in a personal injury claim.

What is the cost to Law Society members?

The cost to Law Society members is an annual fee of \$95 incl GST. The annual fee consists of a \$50 fee (GST free) set by the Professional Standards Councils (PSC), and a \$45 administrative fee (GST inclusive). The \$50 component of the fee is remitted by the Law Society to the PSC under legislation.

Do my practitioners and Incorporated Legal Practice (ILP) all need their own Scheme inclusion?

Yes. In order for the Scheme to effectively apply to your ILP practice and practitioners, each will require Law Society (WA) membership and Scheme inclusion as the Scheme works on a "one-in, all-in" basis.

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all eligible persons providing legal services, including, but not limited to all legal practitioners (that is, persons who hold a current Australian practising certificate) within the law practice, and the law practice itself if it is an ILP, would need to be members of the Law Society.

If the ILP firm later employs any new practitioners to start working within the ILP, they will also require Law Society (WA) membership and application for Scheme inclusion completed.

The Scheme fee per participant is \$95.00 (\$50 Professional Standards Council fee, \$45 Administration fee).

As an example, if there were 2 practitioners at an ILP firm, the Scheme fee would total:

1. ILP Firm: \$95.00
2. Practitioner 1: \$95.00
3. Practitioner 1: \$95.00

Total fee for the Scheme: \$285.00

Will members of the Scheme be required to disclose their limited liability status to clients?

Yes. Participating Members must disclose their limited liability status to clients.

Failure to do so is an offence under the Act.

Participating law practices will need to amend their stationery for this purpose.

The words "Liability limited by a scheme approved under Professional Standards Legislation" in a size equal to or greater than Times New Roman 8 point must be printed on relevant documents, including letterheads, faxes, emails, bills, websites etc. Members should refer to s45 of the Act and regulation 6 of the *Professional Standards Regulations 1998* (WA) to ensure compliance.

From what date will my Scheme inclusion apply?

The Scheme form together with payment are compliance requirements for valid inclusion.

The Scheme is applicable from the date of payment of the Scheme fees. If a practitioner pays their Scheme fee but not their membership fee, the Scheme will be applicable from the date the membership fees are paid. This is because a practitioner must be a valid Law Society (WA) member in order for the Scheme to apply.

The Scheme is not retrospective and cannot be applied to a preceding period.

FURTHER INFORMATION

Further information is available online at lawsocietywa.asn.au or by contacting the Scheme Coordinator at pss@lawsocietywa.asn.au Information is also available from the Professional Standards Council at www.psc.gov.au.

STANDARD DISCLAIMER: The Professional Standards Scheme is administered by the Law Society of Western Australia. The Law Society is unable to provide any legal advice and gives no warranties and makes no representations as to whether any claim brought against a Participating Member or Law Practice will be covered by the Scheme. Participating Members should rely on their own enquires and assessments, specifically as to the adequacy or otherwise of any insurance arrangements and as to the consistency or otherwise of such arrangements with either the Scheme or the Act and seek their own independent legal advice.

Document Version 2023-2024.