

THE LAW SOCIETY OF NEW SOUTH WALES  
PROFESSIONAL STANDARDS SCHEME

# PUBLIC CONSULTATION DOCUMENT



THE LAW SOCIETY  
OF NEW SOUTH WALES

## The Law Society of New South Wales

### 1. What is The Law Society of New South Wales?

The Law Society of New South Wales (the Law Society) is the professional association for solicitors who practise law in New South Wales. The Law Society is constituted as a company limited by guarantee and is governed by a council of 21 members (the Council) who are elected or appointed in accordance with its articles of association.

The Law Society's role is two-fold: to act as a co-regulator of the legal profession – ensuring solicitors meet the highest ethical and professional standards, and to provide services to solicitors as a membership body.

### 2. Who are the Law Society's members?

The Law Society's members include Solicitor Members, Associate Members, Honorary Members, and Incorporated Legal Practice Members. Only Solicitor Members have the right to vote at a general meeting of the Law Society and represent 95% of total members.

Solicitor Membership of the Law Society is available to those persons who are admitted as an Australian lawyer (as defined in the *legal profession legislation*) and who hold a practising certificate issued by the Council.

Under the *legal profession legislation* (as defined in s.3A of the *Legal Profession Uniform Law Application Act 2014*), qualifications for admission as a lawyer are determined by an independent statutory body, the Legal Profession Admission Board of NSW.

All private legal practitioners must be covered by an approved professional indemnity insurance.

## The Professional Standards Scheme

### 1. What is The Law Society of New South Wales Professional Standards Scheme?

The Scheme is provided by the Law Society exclusively for its Solicitor Members in private practice. It is designed for the purposes of:

- (a) improving and promoting the professional standards of Law Society Members; and
- (b) protecting the consumers of legal services.

The Scheme limits the civil liability of Scheme Participants to selected amounts, provided they meet the Scheme's requirements.

### 2. Who administers the Scheme?

Responsibility for administering the Scheme and ensuring compliance with the requirements of the *Professional Standards Act 1994* (the Act) and of the Professional Standards Council (PSC) rests with the Council and its senior officers; predominantly the Chief Executive Officer, the Chief Operating Officer and the Head of Licensing & Scheme.

### 3. How long has the Law Society administered a Scheme?

The Law Society has administered a Scheme continuously since 1996.

### 4. Where does the Scheme operate?

The Scheme is intended to apply in all states where mutual recognition provisions exist – New South Wales, Western Australia, Victoria, Northern Territory, South Australia, Australian Capital Territory, Queensland and Tasmania.

### 5. What types of work will the Scheme cover?

The liability limited by the Scheme includes, to the extent permitted by the Act, all civil liability arising through the provision of legal services (in tort, contract or otherwise). This may include anything done or omitted to be done by a NSW solicitor to whom the Scheme applies, in performing their occupation.

The Scheme does not limit liability for damages arising from any matter to which the Act does not apply. This includes but is not limited to liability for damages arising from death or personal injury to a person, a breach of trust, fraud or dishonesty, and liability the subject of proceedings under Parts 13 and 14 of the *Real Property Act 1900 (NSW)*.

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

### 6. When will the Scheme commence?

The Scheme will commence on 22 November 2018.

### 7. Who will the Scheme be available to?

Unless exempted by the Law Society the Scheme is intended to apply to:

- (a) Solicitor Members who hold a current Australian practising certificate and who are not excluded or exempted from participation in the Scheme; and
- (b) all persons to whom the Scheme applies, by virtue of ss.18, 19, 20, and 20A of the Act; and
- (c) Incorporated Legal Practice Members, where all Australian practising certificate holders are members of the Scheme; and
- (d) all persons to whom the Scheme applied at the relevant time an act or omission occurred giving rise to a cause of action but no longer applies.

## 8. Who will the Scheme not apply to?

The Scheme will not apply to any person who has applied to the Law Society to be exempted from participation in the Scheme; nor does the Scheme apply to:

- (a) corporate legal practitioners; or
- (b) government legal practitioners.

## Operation of the Scheme

### 1. How is the level of limited liability of participating Law Society members determined?

The Scheme provides Participating Members with the benefit of a statutory cap if damages are awarded against them as a result of a successful occupational liability claim. Under the Scheme, the person must have the benefit of insurance to an amount at least equal to the liability cap (monetary ceiling) applying to that person at the relevant time.

The monetary ceiling (maximum amount of liability) applicable for the purposes of limitation of liability under the Scheme at the relevant time are set out in the following table:

CLASS	DESCRIPTION	MONETARY CEILING
1	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	\$1.5 million
2	Participating Members who were at the Relevant Time in a Law Practice consisting of more than 20 Principals; or 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 greater than \$10 million.	\$10 million (a certificate of top up PII cover must be provided)

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.

### 2. How will consumers know if a Law Society Member is covered by the Scheme?

All Scheme Members are required to disclose on all law practice stationery and client communications that their liability is limited under a Professional Standards Scheme. The disclosure must comply with the form of statement prescribed in clause 9 of the *Professional Standards Regulation 2014 [NSW]*.

New Scheme Members are informed of their statutory obligation, under s.33 of the Act, to comply with the disclosure notification requirement. All Scheme Members must annually declare ongoing compliance with this requirement.

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

### 3. How long will the Scheme operate?

It is proposed that the Scheme will operate for 5 years from the date of commencement.

## Benefits of the Scheme

### 1. How will consumers benefit from the Scheme?

The benefit to consumers of the Scheme is an assurance that the professional standards of Scheme Members meet those required by the Law Society, the *legal profession legislation* and the Professional Standards Council. This ensures that consumers are well served by ethical and responsible solicitors.

In addition to the above, the requirement to be covered by an approved professional indemnity insurance policy provides another layer of protection for consumers of legal services.

### 2. How does the Scheme enhance the professional standards of Law Society Members?

The Professional Standards Council expects the Law Society, as an association seeking approval of a Scheme, to demonstrate that its Solicitor Members form a professional community that can protect consumers and manage risk. This includes the requirement that the Law Society regulates its Members in such a manner so as to maintain and improve professional standards.

Consistent with these expectations, which are shared by the Council, the Law Society has implemented a number of strategies and services aimed at enhancing the professional standards of its Members. These include but are not limited to:

#### **Risk Management Framework and Practices**

The Law Society has adopted the principles of risk management as set out in the Risk Management Standard – AS/NZS ISO 31000:2009 *Risk Management – Principles and Guidelines* in developing its overall risk management framework.

Within this wider framework, the Law Society has developed its 5 Year Scheme Risk Management Plan which identifies risks to professional standards and outlines the key objectives and strategies that the Law Society will implement, monitor and measure to address and mitigate these risks.

### **Continuing Occupational Education**

Continuing Professional Development (CPD) is a risk control, the objective of which is to ensure Scheme Members provide competent legal advice and services. Legal practitioners are required to undertake 10 CPD units every year with at least one unit in each of the following fields:

- (i) Ethics and Professional Responsibility;
- (ii) Practice Management and Business Skills;
- (iii) Professional Skills, and
- (iv) Substantive Law.

In addition to the statutory CPD obligations, the Law Society requires all Scheme Members who apply to practise as a principal of a law practice to complete a Practice Management Course (PMC) accredited by the Law Society. The PMC equips solicitors with the skills necessary to act as a principal, while also addressing wellbeing risks identified within the Scheme Risk Plan.

The Law Society's Specialist Accreditation Scheme is an educative scheme for Members which allows them to demonstrate their expertise in a particular area of law. This Scheme also forms part of the Law Society's risk management strategy of promoting continual occupational education beyond the minimum CPD requirements.

### **Regulating Members – licensing, complaints and discipline**

Endowed with co-regulatory duties with the Office of the Legal Services Commissioner, the Law Society sets and enforces professional standards, licenses solicitors to practise, investigates complaints and administers discipline when necessary.

### **3. How does limiting participant liability help consumers?**

Limiting participant liability plays a role in underpinning the availability of a sustainable and affordable professional indemnity insurance policy for Scheme Members. This ensures that the consumers of legal services receive timely and fair compensation for legitimate claims.

It is however important to note that in return for the benefit of capped liability, Scheme Members are expected to meet the requisite professional standards and conduct expected of a genuine profession. This creates a balance that not only allows more Scheme Members to run an efficient and viable law practice, but which in turn also increases competition and thus improves access to justice for consumers of legal services.

### **4. How is liability limited under the Scheme?**

The Law Society has chosen to limit liability for Scheme Members by way of insurance arrangements. Pursuant to *legal profession legislation*, the holder of an Australian practising certificate issued by the Council – which entitles them to engage in private practice – is required to be covered by an approved professional indemnity insurance policy. For the purposes of the Scheme, the amount payable under this policy must not be less than the amount for which liability has sought to be capped at.

Further information regarding The Law Society of New South Wales Professional Standard Scheme can be found on the Law Society's website: [www.lawsociety.com.au](http://www.lawsociety.com.au)