

Professional Standards Scheme Guide



Contents

Introduction	2
What is a Professional Standards Scheme?	3
Where can I obtain a copy of the Law Society of Western Australia's Professional Standards Scheme?	3
What is the Scheme's commencement date?	3
Who is covered by the Scheme?	3
How do I notify the Society of Participation?	3
Benefits of Participation	3
How does the Scheme apply to an Incorporated Legal Practice (ILP)?	3
What if I do not wish to participate in the Scheme?	3
How will the Scheme work in the event of a claim?	3
What are the monetary ceilings for limitation of liability under the Scheme?	4
Is it possible for a higher monetary ceiling to be specified?	4
What type of liability can be limited under the Scheme?	4
What type of liability cannot be limited under the Scheme?	4
Will the Scheme apply to all claims made after the Scheme commencement date?	5
Is the Scheme enforceable under the laws of other Australian states or territories?	5
What should I tell my clients if I am participating in the Scheme?	5
What if I do not notify my clients that I am participating in the Scheme?	6
APPENDIX A - THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME	7
APPENDIX B - THE LAW SOCIETY OF WESTERN AUSTRALIA INSURANCE STANDARD	10

Introduction

Professional benefits for Law Society of Western Australia members

The Law Society of Western Australia's (the Society) Professional Standards Scheme (Scheme) was approved by the Professional Standards Council of Western Australia, acting in conjunction with the appropriate Councils for the other States and Territories, on 15 February 2019, pursuant to the *Professional Standards Act 1997 (WA)* (the Act).

The Scheme is an initiative of the Society which showcases ways we work on behalf of our members to increase the benefits of membership.

Status of Scheme

The Scheme will commence on Monday, 1 July 2019, and will apply in Western Australia as well as New South Wales, Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the ACT under the mutual recognition scheme.

This Scheme replaces the original 2014 scheme which commenced on 1 July 2014 and was designed to remain in effect for 5 years. As with the previous scheme, the new Scheme limits occupational liability to the extent that it may be limited under the Professional Standards Act 1997 (WA) (PS Act).

The 2019 Scheme does not apply to claims prior to its date of commencement.

About the Scheme

This is an 'opt-out' limitation of liability scheme that applies to Participating Members as defined in the Scheme document. The Scheme caps the occupational liability of participating Society members 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, (see paragraph 9 of this guide for further information).

This is a Scheme for limiting liability of members and is not an insurance policy or product.

Participation in the Scheme

A Professional Standards Scheme Participant Information form regarding participation in the Scheme is available on our website at lawsocietywa.asn.au. The Professional Standards Scheme Information form must be returned together with payment.

Practitioners who are not members of the Society, who wish to benefit from the Scheme, must also return a completed membership application form with payment at the same time. A Society membership application form is also available on our website lawsocietywa.asn.au.

For a law practice to gain the full benefit of the Scheme and the limitation of liability, all legal practitioners (that is, any person who holds a current Australian practising certificate) within the law practice, and the law practice itself if it is an incorporated legal practice (ILP), would need to be members of the Society and the Scheme.

If you have any enquiries, please contact Scheme Coordinator, at pss@lawsocietywa.asn.au

1 What is a Professional Standards Scheme?

- 1.1 The Professional Standards legislation enables the establishment of schemes to limit liability of members of occupational associations.
- 1.2 The legislation is state based, and the relevant Act in Western Australia is the Professional Standards Act 1997 (WA) (Act).
- 1.3 The relevant regulations in Western Australia are the Professional Standards Regulations 1998 (WA) (Regulations).
- 1.4 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 members of the occupational association, subject to the scheme itself and the Act.

2 Where can I obtain a copy of the Law Society of Western Australia's Professional Standards Scheme?

The Society's Scheme is attached to this Guide as an appendix and is also available, together with the Act, at lawsocietywa.asn.au.

3 What is the Scheme's commencement date?

The commencement date for the Scheme is 1 July 2019. The Scheme is not retrospective. It applies to Participating Members during the period of their membership of the Society.

4 Who is covered by the Scheme?

- 4.1 Members should refer to sections 30 to 34A of the Act and clause 3 of the Scheme. In general the Scheme applies to
- (a) Ordinary and Life members of the Society (Law Society's Constitution rules 9 and 13) who hold a current Australian practising certificate and who have not been exempted from participation in the Scheme; and
 - (b) Incorporated legal practice members of the Society (Law Society Constitution rule 15) that have not been exempted from participation in the Scheme; and
 - (c) Otherwise as described in clause 3 of the Scheme document.
- 4.2 The Scheme may also apply to employees of a law practice who are not legal practitioners or who do not hold a current practising certificate, but who are members of the Society.

5 How do I notify the Society of Participation?

- 5.1 Members seeking to notify the Society of their participation should provide a completed Professional Standards Scheme Participant Information form to the Society. The form is at lawsocietywa.asn.au.

6 Benefits of Participation

Law practices wishing to benefit from the limitation of liability provided by the Scheme should ensure that:

- All Australian legal practitioners (both principals and legal practitioner employees) renew their membership of the Society and the Scheme on an annual basis;
- If the law practice is an ILP, the ILP retains or gains membership of the Society and the Scheme and renews membership on an annual basis; and
- All Australian legal practitioners who join a law practice (both principals and legal practitioner employees) retain or immediately gain membership of both the Society and the Scheme.

A total fee of \$50 (per annum) including GST which is to be remitted to the Professional Standards Council, will be payable by each Participating Member in the Scheme. This fee will be reviewed annually.

7 How does the Scheme apply to an Incorporated Legal Practice (ILP)?

- 7.1 ILPs that are members of the Society will need to provide a completed Professional Standards Scheme Participant Information form to the Society. The form is available at lawsocietywa.asn.au.
- 7.2 The information is required by The Society in order to administer the Scheme and report to the PSC regarding the Scheme. This information includes:
- (a) Name of each principal (legal practitioner director) of the ILP; and
 - (b) Approximate total annual fee income for the relevant financial year; and
 - (c) Professional indemnity insurance policy number/s for any top-up insurance for the ILP.
- 7.3 From 1 July 2019, a total fee of \$50 (per annum) including GST which is to be remitted to the Professional Standards Council, will be payable by ILPs participating in the Scheme. This fee will be reviewed annually.

8 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 Society members. However, members to whom the Scheme applies and who wish to seek exemption may do so by making an application to the Society pursuant to clause 3.2 of the Scheme. An Application for Exemption form can be found at lawsocietywa.asn.au. 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.

9 How will the Scheme work in the event of a claim?

- 9.1 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.
- 9.2 In principle, if proceedings are brought against a Participating Member relating to occupational liability for

damages arising from a single cause of action, and the Participating Member is able to show that –

- (a) the Participating Member has the benefit of an insurance policy or policies insuring him or her against the occupational liability to which the cause of action relates; and
- (b) the amount payable under the policy or policies in respect of that occupational liability is not less than the amount of the monetary ceiling (maximum amount of liability) specified in the Scheme as applying to such Participating Member to which the cause of action relates, the Participating Member is not liable for damages in relation to that cause of action above the amount of that monetary ceiling (clause 4 of the Scheme).

9.3 The benefit of limited liability under the Scheme is conditional upon the member maintaining the requisite level of insurance cover up to the liability cap. If the Participating Member is not able to satisfy the Court that he or she has the requisite insurance policy, or that the amount payable under his or her insurance policy is not less than the amount of the relevant monetary ceiling specified in the Scheme, he or she will not be entitled to rely on the Scheme to limit his liability for damages.

10 What are the monetary ceilings for limitation of liability under the Scheme?

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:

TIER	DESCRIPTION	MONETARY CEILING
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

11 Is it possible for a higher monetary ceiling to be specified?

The Society has discretionary authority under the Scheme, on application by a Participating Member to specify a higher maximum liability for that member. In order for the Society to do so, the Participating Members liability must be insured up to the higher maximum specified. The Society contemplates that such a request may be made for the purpose of a Participating Member’s commercial relationship with a client or other parties to a commercial transaction. On such an application the Society is entitled to approve a higher maximum amount of liability either in all cases or in any specified case or class of case (clause 5 of the Scheme).

The Higher Maximum Amount Application Form is available at lawsocietywa.asn.au.

12 What type of liability can be limited under the Scheme?

12.1 In compliance with the Act, the Scheme provides for limitation of occupational liability arising from a single cause of action. “Occupational liability” is defined in the Act as follows:

occupational liability means 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.

13 What type of liability cannot be limited under the Scheme?

13.1 There are a number of exclusions which might prevent reliance on the Scheme to limit liability.

Participating Members should therefore seek independent legal advice both in relation to the adequacy or otherwise of their insurance arrangements and the operation of the Scheme.

13.2 Exclusions Under the Act

The Act (and, therefore, the Scheme) does not apply to liability for damages arising from:

- the death of, or personal injury to, a person; or
- a breach of trust; or
- fraud or dishonesty; or
- liability which may be the subject of proceedings under Part XII of the Transfer of Land Act 1893 (WA).

However, 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.

13.3 Defence costs

The Scheme operates to cap damages only. However, the compulsory insurance scheme run by Law Mutual (WA) is a defence costs and excess inclusive scheme, meaning that the \$2 million cover provided by Law Mutual (WA) includes the defence and related costs of handling the claim as well as damages, up to a total of \$2 million.

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 particular reference to the requirements of the new Professional Standards Scheme.

The Society's Insurance Standard is attached to this Guide as an appendix and is also available, together with the Scheme and the Act, 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 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.

13.4 **Single Causes of Action**

Members are referred to section 42 of the Act in regard to the characteristics of the limitation of damages by reference to the event giving rise to the cause of action, claims by multiple claimants and claims against multiple or associated defendants

It is important to note that there may be potential inconsistencies between the Scheme and the insurance arrangements applicable to a Participating Member, including but not limited to insurance provisions relating to 'aggregation', which might prevent reliance on the Scheme to limit liability.

Participating Members should therefore seek independent legal advice both in relation to the adequacy or otherwise of their insurance arrangements and the operation of the Scheme.

13.5 **Relevant Time vs Claims Made**

The Scheme is intended to limit liability arising from an act or omission where a person was a Participating Member at the relevant time – that is, the time an act or omission occurred on which a cause of action is founded – rather than at the time the claim is made.

14 **Will the Scheme apply to all claims made after the Scheme commencement date?**

The Scheme will only limit liability in respect of an act or omission that occurs while the Scheme is in operation. This means that a Participating Member cannot rely on the Scheme to limit liability arising from an act or omission that occurred before the Scheme commenced. In relation to any such acts or omissions giving rise to a potential liability, Participating Members will continue to be reliant on their professional indemnity (or other) insurance and will not gain the benefit of limited liability under the Scheme in respect of such claims.

15 **Is the Scheme enforceable under the laws of other Australian states or territories?**

In addition to this jurisdiction, the Scheme was designed to apply in New South Wales, Victoria, Queensland, South Australia, the Northern Territory and the ACT by means of provisions for mutual recognition in the other jurisdictions. Members should note, however, that provisions for mutual recognition are not uniform nationally and this may affect the extent to which they can benefit from schemes outside of Western Australia.

16 **What should I tell my clients if I am participating in the Scheme?**

Participating members need to disclose their limited liability status. ***Non-disclosure is an offence under the Act.***

Section 45(1) of the Act states:

45. Notification of limitation of liability

(1) If the occupational liability of a person is limited under this Part, the person must ensure that all documents given, or caused to be given, by the person to a client or prospective client that promote or advertise the person or his or her occupation, including official correspondence ordinarily used by the person in the performance of his or her occupation and similar documents, carry a statement to that effect.

Penalty: \$5000.

The Regulations prescribe the following form of statement: "Liability limited by a scheme approved under Professional Standards Legislation."

DOCUMENTS ON WHICH DISCLOSURE SHOULD APPEAR

- Documents (written advice, plans, drawings, specifications and other) produced for clients not accompanied by another document containing a disclosure statement;
- Emails;
- Fax cover sheets;
- Letterheads and letters signed by the company or on its behalf;
- Memoranda of fees and invoices not accompanied by another document containing a disclosure statement; and
- Newsletters and other publications.

DOCUMENTS NOT REQUIRING DISCLOSURE

- advertisements in print media, directory listings and similar forms of promotion or advertising; and
- business cards; and
- 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.

The statement must be printed in a size equal or greater than Times New Roman 8 point.

By way of illustration, below is an extract from the PSC council website www.psc.gov.au.

17 **What if I do not notify my clients that I am participating in the Scheme?**

Failure by a Participating Member to comply with disclosure requirements exposes the Participating Member to a penalty under section 45 of the Act. The Society must undertake an annual audit of Participating Members’ compliance with the disclosure requirements. In the event of non-compliance the PSC is required to be informed.

DISCLAIMER: The Professional Standards Scheme is administered by the Law Society of Western Australia. The 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.

APPENDIX A

THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME

Professional Standards Act 1997 (WA)

PREAMBLE

Occupational Association

- A. The Law Society of Western Australia (“Law Society WA”) is a voluntary occupational association for legal practitioners in Western Australia.
- B. The occupational group, for the purposes of this Scheme, represented by the Law Society consists of legal practitioners who hold an Australian practising certificate.

Nature of Scheme

- C. The Law Society WA has made an application to the Professional Standards Council (“PS Council”) appointed under the *Professional Standards Act 1997 WA* (“Act”), for a scheme under the Act and this document comprises the scheme (“Scheme”).
- D. The scheme has been prepared by the Law Society WA for the purpose of limiting Occupational Liability of Participating Members to the extent to which such liability may be limited under the Act.
- E. The Scheme is intended to operate under the Act.
- F. The Scheme does not affect liability for damages which are below the amount specified in section 39 of the Act. The Scheme limits liability damages to the monetary ceiling specified for that member provided that the Participating Member has insurance as required under section 34 of the Act.
- G. The Scheme is to apply to all Participating Members.

Risk Management

- H. The Law Society WA has furnished the PS Council with a detailed list of the risk management strategies intended to be implemented in respect of its Participating Members and the means by which those strategies are intended to be implemented.
- I. The Law Society will report annually to the PS Council on the implementation and monitoring of its risk management strategies, the effect of those strategies and any changes made to them.

Standards of Insurance

- J. Participating Members are required to maintain current professional indemnity insurance in accordance with the Law Society WA’s Insurance Standard.

Complaints and Discipline

- K. Participating Members are subject to a complaints and discipline regime operating under the *Legal Profession Act 2008*,

Scheme Administration

- L. Responsibility for administration of the Scheme and ensuring that it complies with the requirements of the Act and of the Professional Standards Councils rests with the Law Society WA.

Commencement and Duration

- M. The Scheme commences on 1 July 2019.
- N. The Scheme is intended to remain in force for a period of five (5) years from its commencement, subject to section 44A of the Act.

Jurisdiction

- O. The Scheme is intended to apply in all States and Territories within Australia.

THE LAW SOCIETY OF WESTERN AUSTRALIA SCHEME

1 Preparation of the Scheme

- 1.1 The Scheme is a scheme under the Professional Standards Act 1997 WA prepared by the Law Society WA whose business address is Level 4, 160 St Georges Terrace, Perth, Western Australia.

- 1.2 Relevant definitions for the purpose of this Scheme are as follows:

“Australian Practising Certificate” has the same meaning as it has in the *Legal Profession Act 2008 WA*.

“Corresponding laws” means the *Professional Standards Act 1994* (NSW), the *Professional Standards Act 2003* (Vic) the *Professional Standards Act 2004* (Qld), the *Professional Standards Act 2004* (SA), the *Professional Standards Act 2005* (Tas), the *Professional Standards Act* (NT), and the *Civil Law (Wrongs) Act 2002* (ACT), as applicable.

“Court” has the same meaning as it has in the Act.

“Damages” has the same meaning as it has in the Act.

“Exempted Member” means a member of the Law Society WA who is, or was, at the Relevant Time, exempted by the Law Society WA from participation in the Scheme pursuant to clause 3.2;

“Financial Year” means a financial accounting period ending 30 June.

“legal services” has the same meaning as it has in section 3 of the *Legal Profession Act 2008 WA*.

“Occupational liability” has the same meaning as it has in the Act.

“Participating Members” means those persons specified in clause 3.1 of the Scheme.

“Previous Scheme” means the scheme under the *Professional Standards Act 1997 WA* prepared by the Law Society WA which was in force immediately prior to the commencement of this Scheme.

“Principal” has the same meaning as in section 6(3) of the LP Act:

A principal of a law practice is an Australian legal practitioner who is —

- a sole practitioner (in the case of a law practice constituted by the practitioner); or
- a partner in the law practice (in the case of a law firm); or
- a legal practitioner director in the law practice (in the case of an incorporated legal practice); or
- a legal practitioner partner in the law practice (in the case of a multi disciplinary partnership).

“Professional Standards Legislation” means the legislation applicable in each State and Territory, namely, the the *Professional Standards Act 1994 (NSW)*, the *Professional Standards Act 2003 (Vic)* the *Professional Standards Act 2004 (Qld)*, the *Professional Standards Act 2004 (SA)*, the *Professional Standards Act 2005 (Tas)*, the *Professional Standards Act (NT)*, and the *Civil Law (Wrongs) Act 2002 (ACT)*, as applicable.

“Relevant Time” refers to the time at which the act or omission occurs, not the time when the claim is brought.

“Total Annual Fee Income” means the amount charged during a Financial Year for services provided by or on behalf of a law practice some of whose members are Participating Members.

2 Jurisdiction

- 2.1. The Scheme applies in Western Australia in accordance with the Act.
- 2.2. 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.
- 2.3. Notwithstanding anything to the contrary contained in this Scheme if, in particular circumstances giving rise to occupational liability, the liability of any person which is subject to this Scheme is capped both by this Scheme and also by any other scheme under professional standards legislation (whether of this jurisdiction or under the corresponding law of any other Australian state or territory) and, if the amount of such caps should differ, then the cap on the liability of such person arising from such circumstances which is higher shall be the applicable cap.

3 Persons to Whom the Scheme Applies

- 3.1. The Scheme applies to:
 - 3.1.1. Incorporated Legal Practice members, and ordinary and life members of the Law Society who hold an Australian Practising Certificate who are not exempted under clause 3.2 of the Scheme and who are not persons referred to in clause 3.1.3.1;
 - 3.1.2. All persons to whom, by virtue of sections 31, 32, 33 and 34A of the Act, the Scheme applies;
 - 3.1.3. All members of the Law Society WA who:
 - 3.1.3.1. Immediately prior to the date of commencement of this Scheme, had been exempted from the Previous Scheme pursuant to clause 2.2 of the Previous Scheme; and
 - 3.1.3.2. Have, on the application of the person, been determined by the Law Society WA in writing to be persons whom this Scheme applies.
- 3.2. A person referred to in clause 3.1.1 or 3.1.3 may, on application by that person, be exempted by the Law Society WA from participation in the Scheme with effect from the date specified by the Law Society WA.
- 3.3. The Law Society WA may, upon application by an Exempted Member, revoke an exemption of that person from participation in the Scheme with effect from the date specified by the Law Society WA.

4 Limitation of liability

- 4.1. The Scheme only limits the Occupational Liability of a Participating Member for damages¹:
 - 4.1.1 arising from a single cause of action founded on an act or omission relating to the provision of legal services occurring during the period when the Scheme was in force, of any person to whom the Scheme applied at the time of the act or omission.
 - 4.1.2 to the extent that those Damages exceed the amounts specified in the table in clause 4.3.
- 4.2. If a Participating Member against whom a proceeding relating to Occupational Liability is brought is able to satisfy the Court that:
 - 4.2.1 the Participating Member has the benefit of an insurance policy or policies insuring him or her against the occupational liability to which the cause of action relates; and
 - 4.2.2 the amount payable under the policy or policies in respect of that occupational liability is not less than the amount of the monetary ceiling (maximum amount of liability) specified in clause 3.3 as applying to such Participating Member to which the cause of action relates,the Participating Member is not liable for damages in relation to that cause of action above the amount of that monetary ceiling.

4.3 The monetary ceiling (maximum amount of liability) applicable for the purpose of limitation of liability under the Scheme at the Relevant Time is to be determined according to the following table.

TIER	DESCRIPTION	MONETARY CEILING (Maximum amount of liability)
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

4.4. Notwithstanding anything to the contrary contained in this Scheme if, in particular circumstances giving rise to occupational liability, the liability of any person which is subject to this Scheme is capped both by this Scheme and also by any other scheme under professional standards legislation (whether of this jurisdiction or under the corresponding law of any other Australian state or territory) and, if the amount of such caps should differ, then the cap on the liability of such person arising from such circumstances which is higher shall be the applicable cap.

5 Conferral of discretionary authority

5.1 The Law Society WA has discretionary authority, on application by a Participating Member, to specify in relation to a Participating Member, a higher maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to him or her either in all cases or any specified case or class of case.

5.2 If, in exercise of its discretion under clause 4.1 the Law Society of WA has specified a higher maximum amount of liability (monetary ceiling) than would otherwise apply under the Scheme in relation to a Participating Member, the maximum amount of liability (monetary ceiling) in relation to that Participating Member is that higher maximum amount.

6 Duration

6.1 The Scheme will commence in Western Australia, New South Wales, Queensland, Tasmania and the Northern Territory on 1 July 2019.

6.2 In the Australian Capital Territory and in South Australia, the Scheme will commence:

6.2.1 on the date provided for in the Minister's notice in relation to the Scheme, if a date is provided; or

6.2.2 on the first day two months after the day on which notice was given, in any other case.

6.3 In Victoria, this Scheme will commence:

a. On 1 July 2019 if the Scheme is published in the Government Gazette at least two months prior to that date; or

b. On the first day two months after the Scheme is published in the Government Gazette, in any other case.

6.4 In Western Australia, the Scheme will be in force for five years from its commencement in the jurisdiction.

6.5 For any other jurisdiction, the Scheme will be in force for:

6.5.1 five years from the date of commencement in the jurisdiction; or

6.5.2 five years from the date of commencement in Western Australia;

whichever period ends first.

6.6 Clauses 6.4 and 6.5 are subject to the provisions of the Professional Standards Legislation of each jurisdiction applicable to the revocation, extension or cessation of Schemes.

NOTES:

1 "Damages" as defined in section 4 of the Act means —

(a) damages awarded in respect of a claim or counter claim or claim by way of set off; and

(b) costs in or in relation to the proceedings ordered to be paid in connection with such an award (other than costs incurred in enforcing a judgment or incurred on an appeal made by the defendant); and

(c) any interest payable on the amount of those damages or costs.

APPENDIX B

LAW SOCIETY OF WESTERN AUSTRALIA PROFESSIONAL STANDARDS SCHEME

Insurance Standards (the Insurance Standards)

DEFINITIONS

APRA – the Australian Prudential Regulation Authority or its successors

LSWA – the Law Society of Western Australia (Inc)

Legislated Cover – any insurance provided or taken out pursuant to any legislative professional indemnity insurance coverage requirements in force in the State of Western Australia for law practices and legal practitioners including exemptions to such coverage

Limited Liability – the required Monetary Ceiling or Maximum Amount of Liability as set out in the PSS

National Law Practice – as defined in the Legislated Cover

PII Arrangements - professional indemnity insurance arrangements of a law practice or a PSS Member

PSS – any approved professional standards scheme to which these Insurance Standards apply.

PSS Member – any member of the LSWA who participates in a PSS

Top-up Policy – any professional indemnity insurance policy taken out as part of the PII Arrangements that provides insurance coverage in addition to the Legislated Cover.

APPLICATION

The Insurance Standards apply to any PSS member.

In addition to any PSS requirement to provide evidence of coverage, any PSS Member must, within five (5) business days of a written request from the LSWA, produce proof, satisfactory to LSWA, that the PSS Member is covered by PII Arrangements that comply with the requirements of the Insurance Standards and has been and will be so covered at all times while a PSS Member.

RISK MANAGEMENT

1. The PII Arrangements must, at a minimum, comply with the Legislated Cover other than as set out in point 2 below and must provide for a minimum limit of indemnity or cover of \$2m for any one claim
2. Where the PSS member is a practitioner in a National Law Practice, the PII Arrangements must, at a minimum, comply with any legislative professional indemnity insurance coverage requirements in force in the State or Territory of Australia in which the National Law Practice has taken out professional indemnity insurance and must provide for a minimum limit of cover or indemnity of \$2m for any one claim.

3. Any Top-up Policy must provide coverage that is broadly equivalent to the coverage provided under the Legislated Cover and, in particular, must:
 - a. Provide indemnity for claims made during the relevant period of insurance or from circumstances which are notified during the relevant period of insurance that subsequently give rise to a claim;
 - b. If possible, provide at least one automatic reinstatement of the policy limit of indemnity or an aggregate limit of indemnity that is at least two (2) times the PSS member's Limited Liability;
 - c. Defence costs must be in addition to the limit of indemnity under the PII Arrangements or the Top-up Policy limit must be increased by no less than 25% of the PII Arrangements limit to take into account these costs.
 - d. Indemnify any past, present or future directors, partners or employees of any law practice of which the PSS member is a practitioner;
 - e. Provide retrospective coverage to the date on which the PSS member first become a member of the PSS or any predecessor scheme under which the PSS member's liability was limited;
 - f. Remain current for the same period as the Legislated Cover
 - g. Must be underwritten by an APRA authorised general insurer or insurers unless otherwise approved in writing by LSWA having regard to any regulatory guidance published by the Professional Standards Council in respect of professional indemnity insurance and in accordance with the applicable Professional Standards Act and any relevant subordinate legislation.
4. After a PSS Member ceases to provide legal services, or ceases to practice or retires or the PSS Member's law practice merges with another law practice, the PSS Member must use their best endeavours to maintain a policy of professional indemnity insurance for a period of not less than 7 years where the PSS Member's liability for the provision of legal services previously provided will not otherwise be covered by other PII Arrangements. The coverage of the policy of professional indemnity insurance should be broadly equivalent to the coverage for ceased practices provided under the Legislated Cover.
5. Any PSS Member who is a practitioner in a National Law Practice who makes a claim under their PII Arrangements must promptly notify LSWA of the claim, the amount of the claim and sufficient details of the claim to enable LSWA to understand the nature of the claim and any settlement or other finalisation of that claim.

The Law Society of Western Australia

Level 4, 160 St Georges Terrace, Perth WA 6000

Postal address: PO Box Z5345, Perth WA 6831 or DX 173 Perth

Phone: (08) 9324 8652 | **Fax:** (08) 9324 8699

Email: pss@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

