

Limitation of Liability Scheme

Frequently asked questions

What is the limitation of liability scheme?

The limitation of liability scheme is not an insurance scheme but acts to protect scheme members against negligence claims. It's a statutory scheme, enforced by the courts, that caps the amount of damages that can be awarded against a practice in court.

A limitation of liability scheme established under the relevant professional standards legislation governed by the Professional Standards Councils <http://www.psc.gov.au/>

The Professional Standards Act (2004) (Qld) applies in Queensland (Act). <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/ProfStandA04.pdf>

What are the liability caps under the scheme?

There are two liability caps under the scheme as follows:

- A cap of \$1.5m applies to participating members who were at the relevant time in a law practice constituted of up to and including 20 principals and where the law practice generates total annual fee income for the financial year up to and including \$10m.

- A cap of \$10m applies to participating members who were at the relevant time in a law practice constituted of more than 20 principals and where the law practice generates total annual fee income for the financial year more than \$10m.

Note: The Law Society has discretionary authority, on application by a participating member, to specify in relation to the 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 in any specified case or class of case.

What are the requirements to join the scheme?

You must be a full member of QLS who holds a current Australian practising certificate and you must have the benefit of the applicable PII.

Note: Generally, if you are an employee of a law practice you will have the benefit of PII as the PII covers the law practice that provides the legal services and the employees of that law practice.

Does the liability cap under the scheme include defence costs?

The Scheme operates to provide a liability cap which is exclusive of defence costs.

For example, if a participating member has the benefit of professional indemnity insurance (PII) of \$2m and a liability cap of \$1.5m, the participating member has an additional \$500,000 under the PII to finance the defence costs. This is sufficient for the majority of claims although there remains the possibility that where defence costs exceed \$500,000, there will be a shortfall.

Note: Most PII policies are inclusive of defence costs.

How does it work?

If a claim for damages is made against the participating member and he or she establishes that they have the benefit of the liability cap under the Scheme, then damages cannot be awarded against them above the amount of the cap.

For example: If an employed solicitor had the benefit of PII up to \$2m and was sued for \$3m, with the benefit of the Scheme the solicitor would be able to limit their liability to \$1.5m and thereby reduce their exposure to serious financial risk of a claim in excess of the amount of their PII (in this case \$1m).

Note: PII will cover the damages up to the amount of the cap.

What are the exclusions to the scheme?

- ILP's as corporate entities
- Personal injury claims
- Fraud, dishonesty, breach of trust
- Part 9, division 2, subdivision C of the *Land Title Act 1994* (claims under the Queensland State Government Fidelity Fund for title fraud)

Who is covered by the Scheme?

The Scheme only operates to protect full members of QLS ie individuals not practices.

It is important to note that currently only individuals can be members of QLS only, so an Incorporated Legal Practice (ILP) cannot be a member of QLS and accordingly cannot be a member of the Scheme. QLS is seeking amendment to the *Legal Professional Act 2007*, which will allow changes to both its membership arrangements and the Scheme, which will in turn enable ILPs to benefit from a cap on liability in the future.

Note: The Law Institute of Victoria and the Law Society of South Australia both have corporate membership, so ILPs can benefit from the cap in liability under these respective schemes.

What type of liability is covered by the Scheme?

The Scheme limits the *Occupational Liability* of a participating member to the relevant Scheme. Schedule 2 of the Act defines Occupational Liability as "any civil liability arising, whether 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 the member's occupation".

As the Scheme only applies to individuals, how can a law practice gain full benefit of the liability cap?

From a practical perspective, to gain the full benefit of the liability cap, all solicitors within the law practice should be members of the Scheme.

Law practices wishing to gain the full benefit of the liability cap should therefore ensure that:

1. all newly admitted solicitors immediately become members of QLS and the Scheme; and
2. all solicitors promptly renew their membership of QLS and the Scheme on an annual basis.

If I am an employed solicitor and there is an allegation of negligence against me, I understand that my employer's professional indemnity insurance will cover me; so why do I need to join the Scheme?

Any entity or person has exposure to a claim for damages, irrespective of the manner in which the services were provided. This means that principals, employees and ILPs are exposed to claims. Generally claims are made against the law practice that provided the services, however on occasion individual practitioners are also joined to a claim. If that individual is not part of the Scheme then there is exposure to liability.

How do I join?

Complete the application form on the QLS website http://www.qls.com.au/Becoming_a_member/Member_benefits/Professional_benefits/Limitation_of_Liability_Scheme

Alternatively, you can apply to join the Scheme when you renew your practising certificate and membership online.

What is the cost to join?

\$135.14 including GST for each member, per annum.

How does a member of the Scheme disclose to clients that their liability is limited?

Participating members must ensure that all *business documents* given to a client or prospective client include a prescribed statement.

The *Professional Standards Regulation 2007* (Qld) prescribes a statement for participating members to use to ensure that clients are aware of their participation in the Scheme. The wording, which must be printed in a size not less than the face measurement of Times New Roman typeface in 8 point, is:

"Liability limited by a scheme approved under professional standards legislation."

How does an ILP disclose to clients that individuals in its employ are members of the Scheme and have limited their liability?

Incorporated legal practices might consider adding the word 'Individual' to their prescribed statement to clarify that individual rather than corporate liability is limited, with the statement therefore reading:

"Individual liability limited by a scheme approved under professional standards legislation".

How does an ILP that provides personal injury work disclose to clients that individuals in its employ are members of the Scheme and have limited their liability?

Practices that do personal injury work might also wish to clarify that personal injury work is excluded from the cap by adding to the statement as follows:

"Individual liability limited by a scheme approved under professional standards legislation (personal injury work exempted)".

What is a *business document* for the purposes of the prescribed notice?

Business documents for the purposes of the prescribed notice include:

- documents (written advice, plans, drawings, specifications and other) produced for clients not accompanied by another document containing a disclosure statement
- email
- fax cover sheets

- letterheads and letters signed by the company or on its behalf
- memorandum of fees and invoices not accompanied by another document containing a disclosure statement
- newsletters and other publications.

What is not a *business document* for the purposes of prescribed notice?

The following are not business documents for the purposes of the prescribed notice:

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

Will the Scheme be enforceable under Commonwealth Laws?

The Commonwealth Government has a mechanism called 'prescription' for recognising and exempting schemes under relevant Commonwealth legislation. Members of occupational associations who participate in schemes that have been prescribed will have their limited liability recognised under specific sections of these Commonwealth laws.

The Scheme has been prescribed under the *Competition and Consumer Act 2010* and the *Trade Practices Act 1974*.

Is the Scheme enforceable under the laws of other Australian States or territories?

The Scheme will only apply in Queensland. This means that it will only apply to acts or omissions by participating members that occur in Queensland.

Not all jurisdictions have mutual recognition provisions in their professional standards legislation. At present, there are mutual recognition provisions in the Queensland, New South Wales, Northern Territory, Australian Capital Territory and Victorian professional standards legislation. The professional standards legislation in South Australia, Western Australia and Tasmania does not contain mutual recognition provisions.

Members are strongly encouraged to read the [Guide to the Queensland Law Society Limitation of Liability Scheme](#) to gain further understanding of the Scheme.