

Guidance for Members

The QLS Professional Standards Scheme

Introduction

The Professional Standards Act 2004 (Qld) (**the Act**) provides for the development by occupational associations of schemes to improve professional standards, protect consumers and limit the civil liability of members.

The Professional Standards Councils have approved a Professional Standards Scheme of Queensland Law Society Inc. (**Scheme**) to commence on 1 July 2022. That Scheme will operate for five years. It applies in all States and Territories.

The statutory objectives of a scheme are reciprocal: -

- a. it binds the Society as the occupational association for the Solicitors of Queensland to monitor, enforce and improve the professional standards of its members and protect the consumers of their member's services; and
- b. serves to cap the civil liability for damages that Scheme participants may be required to pay if a court upholds a claim against them.

The Scheme is not insurance. Rather it limits a participating Practitioner's liability or damages in causes of action arising from the provision of legal services. The Scheme does not affect the requirement that Practitioners obtain or have the benefit of professional indemnity insurance.

Most Queensland based Practitioners and law practices have insurance up to \$2 million (inclusive of defence costs) with Lexon Insurance Pte Ltd (**Lexon**) through the Professional Indemnity Insurance Scheme established by *the Legal Profession Act 2007* and the *Queensland Law Society Indemnity Rule 2005*.

If, however, they were found liable for an amount over \$2 million then in the absence of top up insurance they would not have enough insurance to cover damages. The Scheme would protect them by limiting the damages awarded to \$1.5 million (in most cases) with \$500,000.00 to meet defence costs.

Participants in the Scheme may not contract out of its application to a client. They must make certain disclosures in their business documents.

The Scheme is part and parcel of membership for all:-

- full members (including Community Legal Service employees)
- honorary members who hold a PC; and
- ILP members

However, Government and Corporate PC holders are not eligible to participate. Eligible members who do not wish to participate must apply in writing for exemption from the Scheme.

The Scheme provides two defined levels of limitation of liability and the Society has a discretion to provide levels above that.

That discretion can apply to all or some cases as the law practice might require. A higher cap may sometimes be required in respect of some clients. It is important to consider the need for a higher level of limitation against the inability of a participant to contract out of the Scheme with any client.

What is covered by the Scheme?

The Scheme provides for a limitation of occupational liability arising from a single cause of action. The Scheme covers acts or omissions that occur after its commencement.

Occupational liability is defined in the Act as civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association acting in the performance of his or her occupation. So, in the Scheme's case, acting as a solicitor.

How does the Scheme work?

Proceedings are brought against a participating scheme member relating to occupational liability arising from a single cause of action and the participating member is able to show that: -

- a. they have the requisite professional indemnity insurance cover insuring against the occupational liability to which the cause of action relates;
- b. the amount payable under the insurance policy is not less than the amount of the relevant monetary ceiling specified in the Scheme;

then the Court in awarding damages will limit those damages to the relevant monetary ceiling specified in the scheme.

Who participates in the Scheme?

Unless ineligible or exempted by the Society the Scheme applies to: -

- full members
- honorary members who hold a current Practising Certificate
- ILP members
- Partners, employees or associates of the Law Practice of those full or honorary members subject to those persons also being, if eligible, full or honorary members of the Society.

It is a requirement of the Scheme and of the Act that all full members, honorary members holding current local Practising Certificates and ILP members be participating members of the Scheme unless they apply for and are granted an exemption. Participating practitioners and ILP's will be required to acknowledge that they will comply with requirements made of them by the Society to enable it to meet its reporting obligations consequent of the Scheme.

For a law practice to gain the benefit of the Scheme all Legal Practitioners within the law practice must be a full member of the Society and not be exempt from the Scheme (see ss20 and '21 of the Act).

It means in the case of an ILP that it must, if eligible, be a member of the Society and participate in the Scheme.

In order to be an ILP member of the Society all employed solicitors must hold current local practising certificates and be members of the Society. In order for the ILP member to be eligible to participate in the scheme all its eligible staff must participate in the Scheme. The ILP must maintain the full membership of its eligible staff and its own membership of the Society. Participation in the Scheme will lapse in the event an eligible staff member is not a member of the Society participating in the scheme.

Therefore, Law Practices wishing to benefit from the Scheme must ensure that: -

- all Legal Practitioners renew their membership of the Society and not apply for exemption from the Scheme
- all new Legal Practitioners who join the law practice during the year immediately obtain membership of the Society, if they are not already members and if they have been exempted from the scheme apply to the Society for a revocation of that exemption
- if the law practice is an eligible ILP, the Corporate entity joins the Law Society as an ILP member and participates in the Scheme.

The benefit of requisite Professional Indemnity Insurance

Those participating in the Scheme must have the benefit of Professional Indemnity Insurance no less than the amount of the limitation of liability applying to the Scheme participant at the relevant time.

Each year Scheme participants are required to provide to the Society evidence of Professional Indemnity Insurance cover to the necessary standard. Those who have the benefit of Lexon Insurance hold Professional Indemnity Insurance of the requisite standard. The insurance issued by the equivalent providers in the other Australian States and Territories is also of requisite standard.

Participating scheme members who are required (see **What are the Monetary Ceilings for limitation of liability under the Scheme?**) or who choose to take out insurance in excess of \$1.5 million must ensure the excess cover: -

- a. has at least one automatic reinstatement each year;
- b. covers all civil liability arising in connection with the practice;
- c. is retrospective for any event giving rise to a claim made during the insured period;
- d. extends to all employees; and
- e. is a claims made policy.

Governing who is excluded or exempted from the Scheme

The Scheme does not apply to full or honorary members who hold a Corporate or Government Practising Certificate. Those members do not hold the requisite professional indemnity insurance.

The Scheme does not apply to full members who have applied for and been granted an exemption from participation in the Scheme. As participation in the Scheme is an incident of membership an exemption is effective only from year to year. Just as membership is renewed annually so is participation in or exemption from the Scheme.

Participation in the Scheme follows the practitioner from practice to practice over the year in the same manner as membership of the Society. If a practitioner leaves a participating law practice for one that does not participate the practitioner should consider whether they need to obtain an exemption from the Scheme given the obligation to make disclosures in business documents may not be able to be fulfilled.

Inclusions/exclusions under the Act

There are occupational liabilities that are excluded from Scheme protection. Section 6 of the Act specifically excludes liability arising from: -

1. The death of, or personal injury, to a person;
2. Any negligence or other fault of a Lawyer in acting for a client in a personal injury claim;
3. A breach of trust;
4. Fraud or dishonesty; or
5. Liability which may be the subject of a proceeding under Part 9 Division 2 Subdivision C of the *Land title Act 1994*.

Law Practices with a high concentration of work in personal injuries should consider this carefully when deciding whether to participate in the Scheme.

The Scheme can only affect liability for damages arising from a single cause of action to the extent to which liability results in damages exceeding the limitation amount.

Damages does not include defence costs.

Claimants who have a joint interest in a cause of action are treated as a single claim for the purposes of the Act.

Where one person has two or more claims arising out of a single event against persons to whom the Scheme applies and who are associated, those claims are treated as a single claim under the Act.

Associated defendants are partners, employees or the same employer or persons who are in a relationship of employer and employee.

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

Can a participating member contract out of the Scheme for specific clients or matters?

Section 67 of the Act prohibits contracting out of the Scheme. However, the Society has a discretion to increase the monetary ceiling in: -

- all cases,
- any specified case; or
- classes of cases.

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

The Scheme operates to limit the occupational liability of participating members for damages to amounts of:-

- \$1.5 million,
- \$10 million or
- a specified maximum amount than would otherwise apply depending on the insurance held, total revenue and the number of Principals of the law practice of the participating scheme member.

So there are two classes of monetary ceiling and a further discretion, reserved to the Society.

Class 1. \$1.5 million cap.

Participating Scheme 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 of the relevant time of up to and including \$10 million.

Class 2. \$10 million cap:

- a. Participating Scheme members who were at the relevant time in a law practice consisting of more than 20 Principals; or
- b. Participating Scheme members who were at the relevant time in a law practice where the law practice generates total annual fee income for the Financial Year at the relevant time greater than \$10 million.

There is no exercise of discretion in the allocation of practices to these classes. Thus law practices of up to and including 20 Principals, generating fee income to and including \$10 million are required to hold insurance for the damages arising from the single cause of action to an amount of \$1.5 million. The standard Lexon policy provides this cover.

Law practices consisting of more than 20 Principals or any law practice generating a total annual fee income for the Financial Year at the relevant time of greater than \$10 million fall in to class 2. Those practices, if participating in the Scheme are required to provide to the Society evidence that they hold for the relevant time top up cover to the amount of \$10 million.

The discretionary higher cap

Apart from the two Classes, participating members may apply for a higher maximum amount of liability than would otherwise apply to them under the Scheme. The higher maximum is at the discretion of the Society.

In order to obtain the exercise of this discretion the participating member's law practice must hold Professional Indemnity Insurance commensurate with the higher maximum of liability sought. The discretion may be exercised in respect of: -

- all cases of the law practice;
- any specified class of case undertaken by the law practice; or
- in relation to specified cases, including clients.

If a practice that falls within Class 1 wishes to avail itself of a limitation of liability in excess of \$1.5 million then it must obtain the exercise of the discretion.

The obligation to disclose your Scheme status to clients

Section 33 of the Act requires participating scheme members to disclose their limited liability status. The Act and its regulations describe the following form of disclosure notification: -

"Liability limited by a scheme approved under Professional Standards Legislation"

The statement must be printed in a size equal to or greater than the face measurement of Times New Roman typeface in eight point. A participating member will not be able to rely on the Scheme to limit liability if before the time at which the act or omission giving rise to the cause of action occurred, the participating member did not give or cause to be given to the client documents that carried the required disclosure notification.

The Professional Standards Councils advise that notification should appear on the following documents: -

Statements must appear on all materials that are or could be given to current or prospective clients by the Society's participating members to promote themselves or their occupation. Examples include, but are not limited to: -

- letterhead and letters signed by the law practice on or on its behalf
- fax cover sheets
- newsletters and other publications
- the law practice website
- written advice, plans, drawings, specifications and any other client documents unaccompanied by a separate document with the disclosure statement
- memorandum of fees and invoices unaccompanied by a separate document with the disclosure statement.

The statement does not need to appear on: -

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

It is the responsibility of the Principals of the law practice to ensure that the disclosure requirements are met. A failure to comply is a breach of s33 of the Act.

The Society conducts an annual audit of participating practices to check on their disclosures.

Variations of disclosure notification where a Corporation which is an ILP does not participate in the Scheme

For an ILP where all Australian Legal Practitioners are participating in the Scheme but the Corporation does not it is wrong to state that liability is limited by a scheme approved under the Professional Standards Legislation. The liability of the ILP is not so limited.

Such a statement on correspondence from an ILP may be in breach of s29 (1) (m) and 151 (1) (m) of the *Australian Consumer Law 2010*. Those sections prescribe the making of a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee right or remedy in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services.

Provided Legal Practitioners employed by an ILP are persons to whom the Scheme applies then this statement would not appear to contravene the Australian Consumer Law while still satisfying the requirements of the Act

“Liability limited by a scheme approved under Professional Standards Legislation

Legal Practitioners employed by (name of ILP) are members of the scheme.”

No variation on the prescribed disclosure is required when Legal Practitioners and the ILP Corporation participate in the Scheme.

Mutual recognition

The Scheme recognises the provision of legal services transcend State boundaries. Approval of the Scheme under professional standards legislation or legislation of another State or Territory is designed to have the effect of limiting the liability of any person to whom the Scheme applied at the relevant time at which the relevant act or omission occurred and where the act or omission occurred in the State or Territory that has recognised the Scheme.

Forms (all to be drawn up)

- ILP membership application
- Scheme Application Form for non participating Member
- Application to be exempted from Scheme
- Revocation of Exemption Form
- Class 2 Practice Nomination Form
- Discretionary Higher Cap Form