

0.0.1 Guidance

Application organisation and process

For Schemes being prepared under Professional Standards
Legislation

June 2021





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Approved By

Chief Executive Officer, Professional Standards Councils

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1.0	PSC	18 June 2021	1 July 2021	This is a new guidance

Disclaimer

This guidance is applicable only to an occupational association preparing a Scheme for approval under Professional Standards Legislation. It does not constitute legal or other professional advice and should not be relied on as such. An occupational associations should seek its own legal/professional advice to find out how the Professional Standards Legislation and other relevant laws and regulations may apply to it. For access to legislation in force in NSW, go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

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1. Guidance statement

A key aim of this guidance is to assist your association in understanding the various elements of the application process for a Professional Standards Scheme (Scheme). This provides detail of the introductory Briefing Note 0.0 *Application Framework matrix*, particularly to outline the application process terminology and requirements.

2. Purpose

The guidance is structured to explain to the following key elements, involving the legislation, terminology, and requirements of the Scheme application process:

- section 3: What is a Scheme prepared under Professional Standards Legislation?
- section 4: What must be provided in an initial Scheme application?
- section 5: What must be provided when re-applying for a Scheme (re-make)?
- section 6: What must be provided when applying to amend a Scheme?

If you are applying to re-make a Scheme, or make an instrument amending an existing Scheme, and are familiar with the application process, please refer to section 5 or 6, as required.

3. What is a Scheme prepared under Professional Standards Legislation?

A Scheme is a time-limited statutory instrument that operates to limit the civil liability of members of occupational associations in respect of a claim, in some circumstances¹, after a court has determined the amount of damages otherwise payable by a defendant to whom the Scheme applies. A Scheme only applies to a cause of action founded on an act or omission occurring after the Scheme has commenced, and during the Scheme's term. In order for a person to plead a Scheme in court, the court must be satisfied that the person has the benefit of an insurance policy where the amount payable is not less than the limitation of liability in the Scheme and the policy must respond to that particular claim (for instance, the Scheme limitation will not apply if the claim is subject to a policy exclusion).

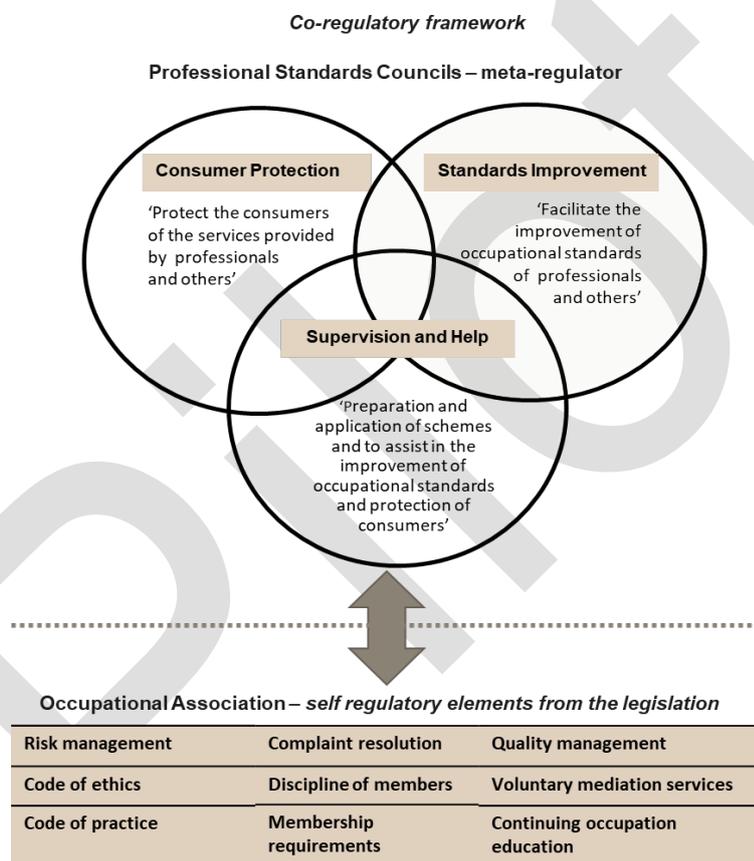
The approval of a Scheme creates a co-regulatory relationship between the Professional Standards Councils (the Councils), the occupational association, and its members, towards fulfilment of the statutory objects of improving occupational standards and protecting consumers of members' services.

This co-regulatory relationship, based on the legislation, involves the Councils as a meta-regulator of the association, rather than a regulator. That is, the Councils' role is to oversee the association's self-regulation, not to regulate the members of the association directly. This relationship has three primary functions:

¹ For example, the Professional Standards Legislation does not apply to limit liability for damages arising from death or personal injury, a breach of trust, or fraud or dishonesty.



- Councils - provide leadership for encouraging, advising and assisting in the development by occupational associations of specific self-regulatory professional standards (see the diagram below).
- Occupational association - responsible for regulating and monitoring the compliance obligations and conduct of its members through robust systems to protect consumer interests, such as standards for professional indemnity insurance, consumer-focused risk management strategies, and complaints and disciplinary procedures.
- Supervisory assurance: provided to the Councils by occupational associations through annual reporting by the associations.



This regulatory relationship is entered into voluntarily: there is no compulsion for any eligible occupational association to prepare a Scheme. However, once a Scheme has been approved by the Councils, all compliance obligations are mandatory and, should an association be unable to meet them, its Scheme may be revoked.

a) What are the Councils – and the Authority?

Each state and territory have Professional Standards Legislation in place that establishes a Professional Standards Council - there are eight Councils – each with responsibility to supervise the preparation and approval of Schemes, and to assist in the improvement of occupational standards and protection of consumers.



Each state and territory appoint the same members to its respective Council. The legislation provides that the Councils should work co-operatively, where a Scheme operates across multiple jurisdictions (often referred to as 'mutual recognition').

The Professional Standards Authority is the national regulatory support agency of the Councils, operating under the Better Regulation Division of the NSW Department of Customer Service. The Authority can provide guidance and assistance to an occupational association wishing to apply for a Scheme and will typically be your first point of contact in this process.

b) What is the *Application Framework*?

This Application Framework is for occupational associations to assist in the preparation of an application to the Councils for the approval of a Scheme under professional standards legislation.

The framework is referenced throughout to the relevant provisions of the legislation in all states and territories; these usually appear as a table in the text, with the name of the legislation signified by the name of the jurisdiction (see example at the end of this Module). The legislation for each state and territory is as follows:

State or Territory	Title of legislation
New South Wales	<i>Professional Standards Act 1994</i> (NSW)
Australian Capital Territory	<i>Civil Law (Wrongs) Act 2002</i> (ACT)
Northern Territory	<i>Professional Standards Act 2004</i> (NT)
Queensland	<i>Professional Standards Act 2004</i> (Qld)
South Australia	<i>Professional Standards Act 2004</i> (SA)
Tasmania	<i>Professional Standards Act 2005</i> (Tas)
Victoria	<i>Professional Standards Act 2003</i> (Vic)
Western Australia	<i>Professional Standards Act 1997</i> (WA)

You need to note the following:

- refer to the sections of legislation in the relevant jurisdiction/s affecting your application. Some of the material in the modules may refer to the NSW legislation only, by way of illustration – however, with some variations, the legislation is nationally harmonised, consistent with the requirement that the Councils operate co-operatively in fulfilment of their statutory functions.
- nothing in this framework should be relied upon as legal advice or instruction. The application framework is a tool to assist in the preparation of an application to the Councils for the approval of a Scheme only.
- the framework should facilitate an application for a Scheme from any association, regardless of its scale or regulatory experience, if it meets the requisite eligibility criteria.



Consistent with the objects of the legislation², you must be mindful of the consumer protection and standards improvement aspects of the evidence you are providing with your application and communicate these clearly to the Councils.

c) How is the *Application Framework* organised?

The framework may be viewed as a matrix, comprising six modules, with submodules, templates, and guidance, found in Briefing Note 0.0 *Application Framework matrix*.

The framework supports a scalable and modular approach: each module can be completed free-standing and is internally referential. In some cases - for example, **where a previously-approved Scheme is being replaced by a new instrument, or being amended** - it may not be necessary for the association to complete the entire framework: consult with the Authority to confirm which modules are required for an application for a replacement Scheme, or an instrument amending a Scheme. **Refer to sections 5 and 6 for detail.**

Within the framework, the most critical submodule for a new applicant is 1.0, which deals with an association's eligibility to have a Scheme approved under professional standards legislation. The Councils are only empowered to approve a Scheme prepared by an occupational association. This may sound straightforward, but it is necessary to demonstrate that your association meets the definition of "occupational association" for the purposes of the legislation.

New applicants are asked to complete module 1.0 *The association and its capability to operate a Professional Standards Scheme* first, before attempting to respond to the rest of the framework. This module comprises a template, whose completion will assist you to determine if you have systems in place to address common risks associated with the application process, and three submodules:

- Submodule 1.1 *Occupational group and occupational association*
- Submodule 1.2 *Association enterprise/business risk management system*
- Submodule 1.3 *Association governance, conflicts of interest and financial arrangements*
- Submodule 1.4 *Other statutory requirements*

These components of the application are considered by the Councils to be indicative of an occupational association's readiness to regulate the conduct and competency of its members, consistent with the objects of the legislation, as described above.

Having met the threshold requirement of being an occupational association, you must be able to evidence capacity to operate a Scheme and meet the statutory compliance

² While there is minor variation in the form of words used in some jurisdictions, the objects of the legislation are fourfold, namely, (1) to enable the creation of Schemes to limit the civil liability of professionals and others; (2) to facilitate the improvement of occupational standards of professionals and others; (3) to protect the consumers of the services provided by professionals and others; and (4) to establish the Professional Standards Councils to supervise the preparation and approval of Schemes and to assist in the improvement of occupational standards and protection of consumers.



reporting requirements. The Councils therefore expect that an association has the systems and resources in place to:

- ensure that members disclose their limited liability under the Scheme
- monitor and enforce members' insurance requirements under the Scheme
- continuously improve risk management practices
- conduct annual audits of membership numbers
- pay the regulatory fees associated with the Scheme.
- manage and resolve consumer complaints about members
- take disciplinary action against members where necessary
- understand its role as a regulator of professional standards, including its interaction with other regulators.

These matters are described in detail in the various modules and submodules.

d) Modules, submodules and guidance

Before beginning to respond to each module/submodule, it is important to consider the following:

- The complete suite of modules/submodules is designed for initial applications for a Professional Standards Scheme. These should be read in conjunction with the identified guidance document, if applicable - note that the guidance aims to assist you in completing the module/sub-module.
- The information requested in the module/submodule is mandatory, as required explicitly under the Professional Standards Legislation or otherwise a reasonable requirement in order that the Councils can fulfill their statutory responsibilities.
- Once you have completed the module/submodule, you need your governing body or senior manager nominated by your Chief Executive Officer to review and approve the information that is provided to the Councils.
- If your association is unable to complete the module/submodule or seeks clarification on any of the questions, contact the Authority for assistance. Note that the Councils have a statutory function to advise, assist and encourage associations with their occupational standards and member regulation (refer to section 43 of the *Professional Standards Act 1994* (NSW) for example), which may be achieved through the operation of a Scheme. As noted above, the Authority is the national support agency for the Councils.
- The information being requested is freestanding and can be completed and provided to the Councils on its own, or alongside some, or all, of the other modules/submodules.
- Your submission responding to the module/submodule should have its own table of contents, body and attachments and, as far as practicable, should avoid cross-referencing other application modules. This allows each



module/Submodule to be assessed and analysed as a discrete submission to Councils.

(Note: refer to sections 5 and 6 respectively for detail on an application for a replacement Scheme, or an instrument amending a Scheme)

Most modules and submodules have a guidance document attached, explaining Councils' position on the specific component, and designed to assist you to collate the information required to be submitted with its application for a Scheme, according to regulatory best practice. The guidance *does not* form part of the application to be submitted to Council and is meant to advise and assist your association.

Some modules or submodules include a template for completion, which is meant to assist you and, unless otherwise indicated, *does* form part of the application. **The Councils strongly recommend that you use the templates provided, unless you can accurately convey *all* the information required in a way that is more convenient for you.**

The reporting requirements for some modules are self-explanatory and no additional guidance is provided. However, where you have difficulty completing these modules, you are encouraged to contact the Authority for further assistance.

Using this application framework will ensure that you understand:

- the objects of the legislation
- the relevant statutory requirements when applying for a Scheme, and their compliance reporting obligations during the term of a Scheme
- the relevant statutory considerations of the Councils before approving a Scheme
- the ongoing statutory functions of the Councils.

Further, it will ensure that you only provide the Councils with information that is relevant to the statutory considerations of the Councils, and that the evidence provided in support of the proposed Scheme is presented in a clear, consistent and accessible format, to facilitate Councils' decision-making.

4. What must be provided in an initial Scheme application?

This information applies to associations that are applying for a Scheme for the first time.

a) What you'll need

Once you are satisfied that your association is an occupational association for the purposes of the Professional Standards Legislation in your jurisdictions (and other jurisdictions where the Scheme is intended to apply), and able to provide evidence that it has sound governance systems and adequate resources to operate a Scheme, an enterprise risk management system not inconsistent with the Australian Standard, and an understanding of its role as a regulator of member behaviour, you will need to provide the following:

Task	Description
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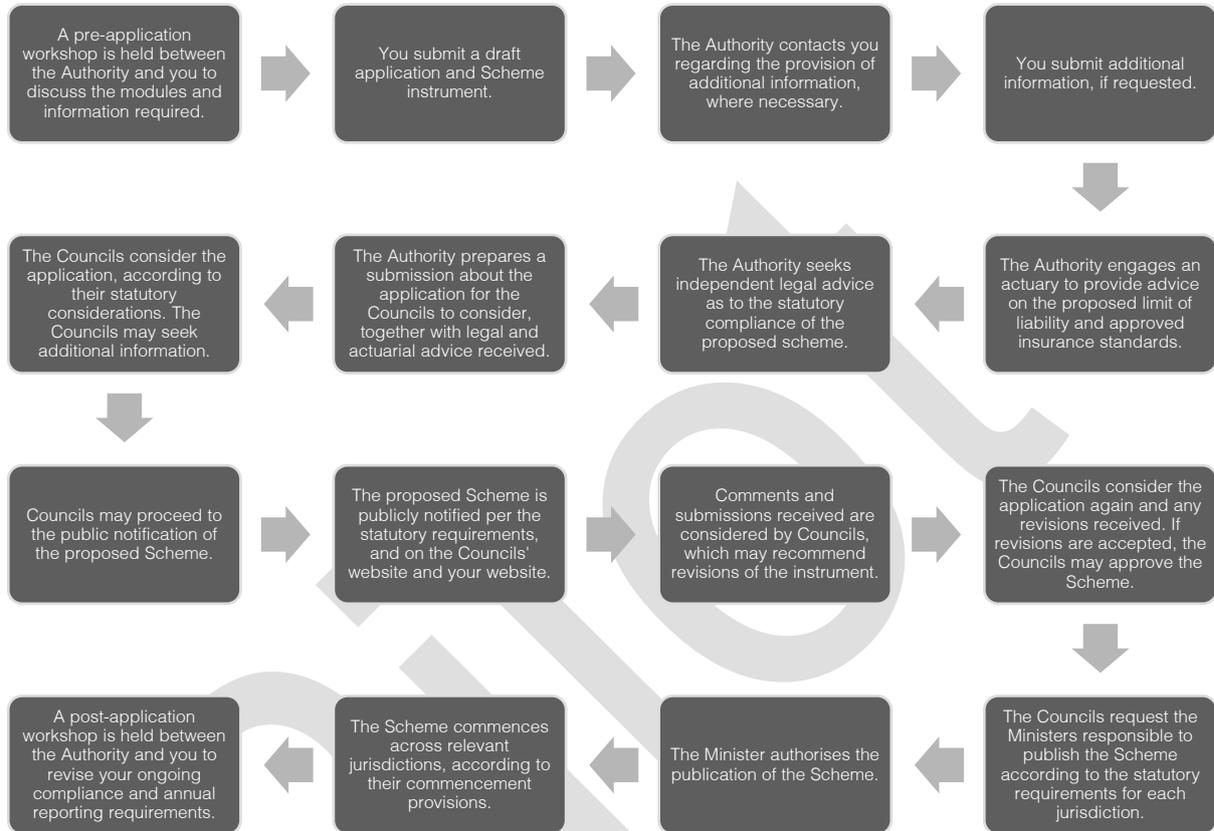


Application fee	<i>\$5,000 per jurisdiction in which the Scheme will apply, if the application is made in New South Wales, or \$5,000 in total if the application is made in any other jurisdiction, payable by EFT</i>
Covering letter from your governing body to the relevant Council	<i>requesting the relevant Council to approve the Scheme instrument (refer to Submodule 2.0)</i>
Key elements of the application – enclosed with the covering letter	<ul style="list-style-type: none">• <i>a draft Scheme instrument (refer to Template 2.1.1 and associated Guidance)</i>• <i>a copy of the association's approved insurance standards (refer to Submodule 2.2 and associated Guidance)</i>• <i>a public consultation document (refer to Submodule 2.3 and associated Guidance)</i>• <i>details of other regulatory processes that apply to your association and/or its members (see Submodule 1.4 and associated Guidance)</i>
Responses to all other modules	<i>may be submitted in stages</i>
Attend compulsory meetings/ workshops between the Authority and association	<ul style="list-style-type: none">• <i>Initial meeting: to occur once the association has committed to making an application but, importantly, before it has commenced writing it. The purpose of the meeting is to provide a workshop that explains what the association needs to do, and why; and</i>• <i>End meeting: to occur when the application is complete and the Scheme approved by the Councils. The purpose of this meeting is to provide a workshop that deals with the ongoing compliance and reporting obligations of the Scheme.</i> <p><i>(Note: opportunity exists to arrange ad-hoc meetings to assist with completion of any of the modules/submodules during the course of the application, in the event that the association has considered the guidance but is still experiencing difficulty)</i></p>

The steps in the application process are illustrated below:



b) Steps in the application process



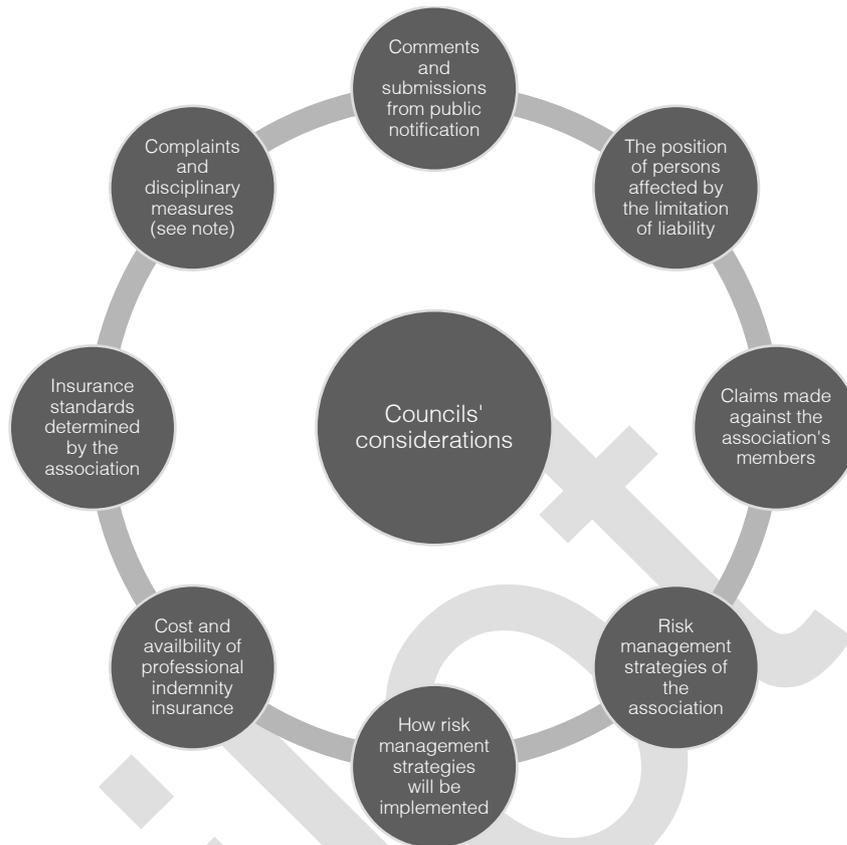
c) Timeline

The Councils require that you submit your complete, final, and governance body approved application at least 10 months before the proposed Scheme is intended to commence.

d) What the Councils will consider

When reviewing the application, the Councils will look for evidence that you have robust systems in place to support your self-regulatory capacity, to improve the occupational standards of your members and protect the consumers of their services.

The mandatory considerations of the Councils are summarised in the diagram below:



Note: A mandatory consideration in the ACT, NT, SA, Tas and Vic legislation is the provision in the Scheme for making and deciding complaints, and enforcing disciplinary measures. The Qld legislation mandates that the Council consider the disciplinary measures in the Scheme. A Scheme that is intended to operate in any or all of these jurisdictions will need to meet these requirements.

These considerations are detailed in the following sections of the legislation:

NSW	ACT	NT	QLD	SA	TAS	VIC	WA
s.10	sch. 4 s.4.7	s.10	s.12	s.11	s.11	s.11	s.23

You are strongly encouraged to seek your own legal advice when drafting a Scheme in order to:

- ensure that the instrument complies with the applicable Professional Standards Legislation, together with any other relevant laws, and achieves its intended purpose.
- you may also wish to consider seeking actuarial advice. An actuarial opinion may be useful evidence to submit in support of the proposed monetary ceiling(s) in the Scheme, particularly where it is a first-time application for a Scheme.

The Councils require that all application materials be submitted electronically.



5. What must be provided when re-applying for a Scheme (remake)?

This information applies to an association that is applying for a new Scheme to replace an instrument currently in force (remake), to ensure continuity between the Schemes³.

Before beginning to prepare an application to remake a Professional Standards Scheme, it is important to consider the following:

- the module/sub-module/guidance set out the relevant application requirements that the Councils require
- before starting the module/submodule, you need to confirm the Councils' requirements for your remake application with the Authority
- if your association has previously provided the information and data sought in this module/submodule to the Councils, whether in a Scheme application, annual association report, or ad hoc report, you need only refer to the previously provided information, or attach that information, and then complete the module/submodule by clearly identifying and advising on improvements or changes undertaken by the association since the previous information was provided to the Councils
- if you cannot complete any part of the modules/submodules, contact the Councils as they have a function to advise, assist and encourage associations with their occupational standards and member regulation (which can be found in section 43 of *Professional Standards Act 1994* (NSW) for example).

a) What you'll need

Task	Description
Application fee	<i>\$5,000 per jurisdiction in which the Scheme will apply, if the application is made in New South Wales, or \$5,000 in total if the application is made in any other jurisdiction, payable by EFT</i>
Covering letter from your governing body to the relevant Council	<i>asking the relevant Council to approve the Scheme instrument (refer to Module 2.0)</i>
Key elements of the application – enclosed with the covering letter	<ul style="list-style-type: none">• <i>a draft Scheme instrument (refer to Template 2.1.1 and associated Guidance)</i>• <i>a copy of the association's approved insurance standards (refer to Submodule 2.2 and associated Guidance)</i>• <i>a public consultation document (refer to Submodule 2.3 and associated Guidance).</i>
Responses to relevant modules	<i>where information has changed since the current Scheme was approved – as detailed below.</i>
Typical supporting information if there are no substantive differences between the Scheme currently	<ul style="list-style-type: none">• <i>the final version of the previous Scheme application (as tabled for approval)</i>• <i>updated data, including (but not limited to):</i><ul style="list-style-type: none">○ <i>claims data</i>○ <i>risk management data</i>

³ Or, in circumstances where an association has previously operated a Scheme.



in force and the proposed Scheme	<ul style="list-style-type: none">o <i>complaints and discipline data</i>o <i>insurance data.</i> <p><i>The Councils expect that these data reflect changes over the life of the current Scheme.</i></p>
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The Councils will use some information provided in your previous Scheme application and in Annual Professional Standards Reports (see Module 6.0 *Annual Professional Standards Report*).

Note that if there *are* substantive changes from the current Scheme to the proposed Scheme, you will need to also provide:

- a marked up and clean copy of the proposed Scheme, clearly showing the changes made to the instrument
- a response to any relevant modules that support the changes to the draft Scheme
- a detailed discussion of consumer harms, consumer protection and persons affected by the Scheme.

The Authority can guide you on what the relevant modules are once the draft Scheme is compared to the current Scheme for operative changes. The Authority can likewise provide guidance on the supporting evidence that may be needed.

b) Timeline

The Councils require that you submit your complete, final, and governance body approved application at least 10 months before the current Scheme expires. This is to reduce the risk of hiatus between the expiry of your current Scheme and commencement of a new Scheme, thereby ensuring continuous consumer protection.

6. What must be provided when applying to amend Scheme?

This information applies to an association that has a Scheme and wishes to have an instrument amending the Scheme approved. Note that amendment *cannot* extend the period for which an approved Scheme is in force.

Before beginning to prepare an application to amend a Scheme, it is important to consider the following:

- the module/sub-module/guidance set out the relevant application requirements that the Councils require
- before starting the module/submodule, you need to confirm the Councils' requirements for your amending application with the Authority
- if your association has previously provided the information and data sought in this module/submodule to the Councils, whether in a Scheme application, annual association report, or ad hoc report, you need only refer to the previously provided information, or attach that information, and then complete the module/submodule by clearly identifying and advising on improvements or



changes undertaken by the association since the previous information was provided to the Councils

- if you cannot complete any part of the modules/submodules, contact the Councils as they have a function to advise, assist and encourage associations with their occupational standards and member regulation (which can be found in section 43 of *Professional Standards Act 1994* (NSW) for example).

a) What you'll need

Task	Description
Amendment fee	<i>\$5,000 per jurisdiction in which the Scheme will apply, if the application is made in New South Wales, or \$5,000 in total if the application is made in any other jurisdiction, payable by EFT</i>
Covering letter from the governing body to the relevant Council	<i>asking the relevant Council to approve the amending instrument (and the Scheme, as amended)</i>
Amending Instrument	<i>an instrument amending the Scheme</i>
Supporting information	<ul style="list-style-type: none">• <i>explain why an amendment is necessary</i>• <i>final version of the previous Scheme application (as tabled for approval)</i>• <i>response to any relevant modules that support the changes to the draft Scheme</i>• <i>detailed discussion of consumer harms, consumer protection and persons affected by the Scheme.</i>

The provisions for amending a Scheme are outlined in the following sections of the professional standards legislation:

NSW	ACT	NT	QLD	SA	TAS	VIC	WA
s.16A	sch. 4 s.4.14	s.17	s.18	s.18	s.18	s.18	s.29A

As with a Scheme remake, the Councils will use some information provided in your previous Scheme application, or in its *Annual Professional Standards Report*.