

2.1.2 Guidance

# Scheme instrument guidance

For Schemes being prepared under Professional Standards  
Legislation

June 2021





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<b>Document Number</b>	1.0
<b>Last Endorsed</b>	New document
<b>Next Review</b>	12 months after commencement of application framework pilot program and every three years thereafter
<b>Written By</b>	Director, Professional Standards Regulation
<b>Approved By</b>	Chief Executive Officer, Professional Standards Councils

## Revision History

Version	Approved by	Approval date	Effective date	Sections modified
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](http://www.legislation.nsw.gov.au).

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## 1. Guidance statement

A key aim of this guidance is to assist your association in completing Submodule 2.1 *Scheme instrument*, using the recommended Scheme Instrument Template. This covers the drafting requirements of the Scheme instrument that assure consumers that the mandatory considerations of the Professional Standards Councils, before approving the Scheme under the Professional Standards Legislation, have been addressed, and ensures that the draft instrument complies with the requirements of the legislation.

The guidance has been developed to assist you to understand and respond to the submodule and drafting requirements.

If your association is unable to complete the submodule or seeks clarification of any aspect of the template or this guidance, please contact the Councils or the Professional Standards Authority for assistance. The Councils have a statutory function to advise, encourage associations with improving their occupational standards and member regulation (refer to section 43 of the *Professional Standards Act 1994* (NSW) for example).

For associations applying to remake or amend a Professional Standards Scheme, the submodule and guidance establish the Scheme instrument information required by the Councils. Section 6 of this guidance outlines the administrative process in this regard.

## 2. Purpose

The Scheme instrument is the single most important document to be submitted with your application to the Councils. All other material submitted is in support of this document and must not be inconsistent with it.

The legislation does not prescribe the form that a Scheme instrument should take. However, the Councils strongly recommend that the occupational association adopt the template provided, with modifications as may be required, having regard to the association's unique circumstances.

Please note that capitalisation of the word "Scheme" is a Council convention. This is not reflected in the legislation.

## 3. Key features

Template 2.1.1 *Scheme instrument*, associated with this guidance, and explained in detail in section 4 below, is to be completed as an enclosure with the cover letter to the application in Module 2.0. The governing body of your association will have reviewed the Scheme instrument, as evidenced by sign off of the letter. A covering letter that does not enclose a draft Scheme instrument will be considered incomplete and cannot



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be accepted<sup>1</sup>, regardless of what other information the association may submit with its request to have a Scheme approved under Professional Standards Legislation.

The drafting of the Scheme instrument used in the template at section 4 below complies with the Professional Standards Legislation in all states and territories.

Although the template is largely self-explanatory, the following guidance sets out the legal or policy reasons for including each recital in the Scheme instrument's preamble, and the clauses in the operative part of the instrument. Using the template, as drafted, makes it clear that an applicant association has submitted evidence relevant to the Council's mandatory considerations, and that the Council has considered all relevant matters, before approving the Scheme.

You may note that, in the Councils' view, the preamble is an important part of the Scheme. Apart from providing context for many of the operative clauses and providing guidance to a Court, the Councils consider that the information contained in this part of the instrument is also the minimum public accountability framework, in as much as the Scheme is a public document<sup>2</sup> and the preamble sets out the initial and ongoing commitments made by the association to its members, consumers of its members' services, and the Councils. Thus, it speaks to the regulatory relationships that approval of the Scheme creates, and provides information to consumers.

The following issues are important to remember:

- Before a Council can approve a Scheme that is intended to operate in more than one jurisdiction, the mutual recognition provisions of the Professional Standards Legislation mandate that the Council also consider any matter that the appropriate Council for the other jurisdiction would have to consider under the corresponding law of that other jurisdiction that relate to the approval of a Scheme prepared in that jurisdiction. The Councils will not approve a Scheme that fails to comply with the statutory requirements in the applicable states and territories.
- The Professional Standards Legislation in all jurisdictions provides that a person who is, or is reasonably likely to be, affected by an approved Scheme that has been properly notified by the Minister responsible, may apply to the Supreme Court for an order that the Scheme is void for want of compliance with the legislation<sup>3</sup>. Thus, a challenge to the legality of a Scheme could be made by a plaintiff against whom a defendant pleaded a Scheme to limit civil liability. It is

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<sup>1</sup> The only exception to this rule is where an occupational association requests that the Council prepare a Scheme on its behalf - see for example the *Professional Standards Act 1994* (NSW) section 7(2). Under these circumstances, the occupational association is still required to submit all of the evidence necessary to support a proposed Scheme, and allow for the Council's mandatory considerations to be acquitted before a Scheme may be approved. The legislation does not provide for co-construction of a Scheme instrument.

<sup>2</sup> Approved Schemes are available in the public domain on the websites of the Professional Standards Councils and relevant occupational associations, and in Government Gazettes. Further, in all jurisdictions except NSW and WA, the professional standards legislation provides that a person to whom a Scheme applies must give a copy to a client, or prospective client, if requested to do so.

<sup>3</sup> This includes a person who is or is reasonably likely to be affected by a Scheme that operates as a Scheme of another jurisdiction.



therefore of vital importance that the applicant ensure that the content of the Scheme is compliant before submitting it.

#### 4. Scheme instrument - template

Below is the template (*with explanatory notes*) to be used for the Scheme instrument.

*Name of Act under which instrument is prepared*

### THE [NAME OF OCCUPATIONAL ASSOCIATION] PROFESSIONAL STANDARDS SCHEME

#### PREAMBLE

- A. The [name of occupational association][acronym of occupational association] is an occupational association.

##### ***Section 7 Preparation and approval of schemes***

- (1) *An occupational association may prepare a scheme.*  
(2) *The Council may, on the application of an occupational association, prepare a scheme.*  
(3) *The Council may, on the application of an occupational association, approve a scheme prepared under this section.*  
(4) *A scheme prepared under this section may indicate an intention to operate as a scheme of this jurisdiction only, or of both this jurisdiction and another jurisdiction.*  
<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div1/sec7>

##### ***Section 4: Definitions***

***occupational association*** means a body corporate:

- (a) *which represents the interests of persons who are members of the same occupational group or related occupational groups, and*  
(b) *the membership of which is limited principally to members of that occupational group or those occupational groups.*

<https://legislation.nsw.gov.au/#/view/act/1994/81/part1/sec4#/part1/sec4/subSec1/!occupationaliability>

- The question of whether an association is an “occupational association” within the meaning of the Professional Standards Legislation is of fundamental importance, because the Council only has the power to approve an application for a Scheme made by an “occupational association”<sup>4</sup>.

- B. The Scheme is prepared by the [acronym of occupational association] for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.

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<sup>4</sup> See Module 1.1 “Occupational Association”.



**Section 28 Limit of occupational liability by schemes**

- (1) *To the extent provided by this Act and the provisions of the scheme, a scheme limits the occupational liability, in respect of a cause of action founded on an act or omission occurring during the period when the scheme is in force, of any person to whom the scheme applied at the time when the act or omission occurred.*
- (2) *The applicable limitation of liability is the limitation specified by the scheme as in force at the time at which the act or omission giving rise to the cause of action concerned occurred.*
- (3) *A limitation of liability that, in accordance with this section, applies in respect of an act or omission continues to apply to every cause of action founded on it, irrespective of when the cause arises or proceedings are instituted in respect of it, and even if the scheme has been amended or has, in accordance with section 32, ceased to be in force.*
- (4) *A person to whom a scheme applies cannot choose not to be subject to the scheme, except in accordance with provisions included in the scheme under section 17 (2).*

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div3/sec28>

- C. The Scheme applies to [describe class or classes of members of the association to whom the Scheme applies].

**Section 17: Persons to whom scheme applies**

- (1) *A scheme may provide that it applies to all persons within an occupational association or to a specified class or classes of persons within an occupational association.*
- (2) *A scheme may provide that the occupational association concerned may, on application by a person, exempt the person from the scheme.*
- (3) *A scheme ceases to apply to a person exempted from the scheme as referred to in subsection (2) on and from the date on which the exemption is granted or on and from a later date specified in the exemption.*
- (4) *Subsection (2) does not apply to a person to whom a scheme applies by virtue of section 18, 19 or 20.*

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div2/sec17>

- References to the term 'person' in the legislation may be taken to include corporations as well as natural persons. The Councils have approved Schemes for occupational associations whose membership comprises individual practitioners, or a combination of corporate entities and natural persons. Professional Standards Legislation is based on a model of meta-regulation, whereby a Council regulates an occupational association, which in turn regulates its members. Approving a Scheme propounded by an association whose membership comprises corporate entities *only* would mean, in practice, that individual practitioners report to the firm, the firm reports to the association, and the association reports to a Council – effectively introducing an additional regulatory layer. Where an association with corporate members only prepares a Scheme, it will need to demonstrate how its members drive codes of ethics and conduct, risk management practices, etc, down to the level of the individual practitioner, and offer a compelling argument that approval of the Scheme will further the objects of the Professional Standards Legislation - in particular, facilitating the improvement of occupational standards and protecting consumers.

- D. The Scheme will have force in [jurisdiction in which the Scheme is made and, if relevant, the other jurisdictions in which the Scheme will apply under the provisions



for mutual recognition contained in the Act]. [If the Scheme is multijurisdictional, add: To the extent that the Scheme applies to limit liability in the other jurisdictions, it is subject to the Professional Standards Legislation of those jurisdictions.]

**Section 7(4) Preparation and approval of schemes**

....

(4) A scheme prepared under this section may indicate an intention to operate as a scheme of this jurisdiction only, or of both this jurisdiction and another jurisdiction.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div1/sec7>

- E. The [acronym of occupational association] has furnished the Council with a detailed list of the risk management strategies to be implemented in respect of its members, and the means by which those strategies are to be implemented.

**Section 36 Risk management strategies**

(1) If an occupational association seeks the approval of the Council under section 7 to a scheme, it must furnish the Council with:

(a) a detailed list of the risk management strategies intended to be implemented in respect of its members, and

(b) the means by which those strategies are intended to be implemented.

(2) The means of implementation may be imposed as a condition of membership or otherwise.

(3) The strategies are to apply in addition to other statutory requirements and must not be inconsistent with them.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part4/sec36>

- F. [Where the Scheme limits liability by reference to insurance arrangements, add:] The [acronym of occupational association] has furnished the Council with details of its insurance standards and professional indemnity insurance claims monitoring process. The [acronym of occupational association] will not amend these insurance standards while the Scheme is in force without prior approval of the Council.

**Section 10(1)(f) and (g): Consideration of comments, submissions and other matters**

10 Consideration of comments, submissions and other matters

(1) Before approving a scheme, the Council must consider the following:

...

(f) the cost and availability of insurance against occupational liability for members of the occupational association concerned,

(g) the standards (referred to in section 27) determined by the occupational association concerned in relation to insurance policies.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div1/sec10#part2/div1/sec10>

**Section 27: Insurance to be of requisite standard**

For the purposes of a scheme, an insurance policy must be a policy, or a policy of a kind, which complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div2/sec27>

**Section 34: Occupational association may compel its members to insure**





- (1) An occupational association may require its members to hold insurance against occupational liability.
- (2) Such a requirement may be imposed as a condition of membership or otherwise.
- (3) The occupational association may set the standards with which the insurance must comply (for example, as to the amount of the insurance).
- (4) The occupational association may specify different standards of insurance for different classes of members or for different kinds of work or on the basis of any other differing circumstances that it considers relevant.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part3/sec34>

- The Council is required to consider the insurance standards of the association as part of its decision-making process, although there is no statutory requirement to consider and approve these separately. On the other hand, in several jurisdictions there are statutory provisions relevant to any proposal to change the insurance standards while a Scheme is in force, and the Councils' powers to approve, or refuse to approve, proposed changes to them, as set out in the table below:

NSW	ACT	NT	QLD	SA	TAS	VIC	WA
-	-	s 16(4) s 28(2)-(4)	s 28	s 17(4) s 29(2)-(4)	s 17(4) s 30(2)	s 17(4) s 29(2)-(4)	-

- In the unusual situation where an association did not compel its members to insure and, for example, the Scheme proposed to limit liability by reference to business assets, the association might not need to set insurance standards and it would not be mandatory to provide such information to the Council. This comment also applies to recital G and clause 4.2, below.

- G. [Where the Scheme limits liability by reference to insurance arrangements, add:] The [acronym of occupational association] has advised its members to whom the Scheme applies that they must have the benefit of a professional indemnity policy that complies with the association's insurance standards and that they remain liable for the amount of any difference between the amount payable to a plaintiff under the policy and the monetary ceiling specified in the Scheme.

***Section 26A Liability in damages not reduced to below relevant limit***

*The liability in damages of a person to whom a scheme applies is not reduced below the relevant limitation imposed by a scheme in force under this Act because the amount available to be paid to the claimant under the insurance policy required for the purposes of this Act in respect of that liability is less than the relevant limitation.*

*Note: Section 4 (1A) permits a defence costs inclusive policy for the purposes of this Act, which may reduce the amount available to be paid to a client in respect of occupational liability covered by the policy. Section 26A makes it clear that this does not reduce the cap on the liability of the scheme participant to the client, and accordingly the scheme participant will continue to be liable to the client for the amount of any difference between the amount payable to the client under the policy and the amount of the cap.*

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-081#sec.26A>

- H. The [acronym of occupational association] has furnished the Council with details of its complaints system and discipline system.



**Section 38: Occupational Associations (Complaints and Discipline) Code**

- (1) A scheme may adopt the provisions of the Model Code set out in Schedule 1 with such additions, omissions or other modifications (if any) as may be approved by the Council.
- (2) The modifications may include provisions relating to the making and determination of complaints and the imposition and enforcement of disciplinary measures against members of an occupational association, including (but not limited to) the following:
- (a) the establishment of committees for the purpose of implementing the Model Code or any of its provisions,
  - (b) the procedure at meetings of any such committee,
  - (c) whether any such committee may administer an oath,
  - (d) the application or exclusion of the rules of and practice as to evidence,
  - (e) the grounds on which a complaint may be made,
  - (f) the verification of complaints by statutory declaration,
  - (g) the suspension of members from membership or from practice,
  - (h) the imposition of fines,
  - (i) the making of appeals,
  - (j) the exchanging of information with other occupational associations (within or outside New South Wales).

<https://legislation.nsw.gov.au/#/view/act/1994/81/part5/sec38>

- I. The [acronym of occupational association] and its members to whom the Scheme applies have undertaken to comply with all reporting obligations associated with the Scheme, in furtherance of the statutory objects of improvement of the occupational standards of its members, and protection of the consumers of such members' services.

**Section 37 Reporting**

- (1) An occupational association must provide information to the Council concerning its risk management strategies if requested to do so by the Council.
- (2) An occupational association must provide an annual report to the Council as to the implementation and monitoring of its risk management strategies, the effect of those strategies and any changes made or proposed to be made to them.
- (3) The occupational association's annual report is to be incorporated into the Council's annual report in such form as the Council determines.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part4/sec37>

**44 Requirement to provide information**

- (1) The Council may, by notice in writing, require an occupational association whose members are subject to a scheme in force under this Act or which seeks the approval of the Council under section 7 to a scheme, or an amendment to or revocation of a scheme, to furnish information to it which it may reasonably require in order to exercise its functions.
- (2) An occupational association which does not comply with a notice under this section is guilty of an offence.

Maximum penalty: 5 penalty units.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part6/div4/sec44#/part6/div4/sec44>

- J. The [acronym of occupational association] has undertaken to remit all fees payable under [the professional standards regulations for the jurisdiction in which the Scheme is made] to the to the Council as and when these become due.



### **53 Regulations**

- (1) *The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*
- (2) *Without limiting the generality of subsection (1), the regulations may make provision concerning the following:*
  - (a) *the fees for applications for the Council's approval, under Division 1 of Part 2, of a scheme, or an amendment to or revocation of a scheme,*
  - (b) *the annual fee to be paid to the Council by an occupational association whose members are subject to a scheme in force under this Act.*
- (3) *A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.*

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-081#sec.53>

- K. The Scheme is intended to commence on [insert date] and remain in force for five (5) years from its commencement unless, prior to that time, it is revoked, its operation ceases, or it is extended.

### **32 Duration of scheme**

- (1) *A scheme must specify the period (not exceeding 5 years) for which it is to remain in force after its commencement.*
- (1A) *Subject to subsection (2), a scheme (other than an interstate scheme) remains in force until:*
  - (a) *the period specified under subsection (1) ends, or*
  - (b) *the scheme is revoked, or*
  - (c) *the scheme's operation ceases because of the operation of another Act, or*
  - (d) *the scheme is declared void, either by an order made by the Supreme Court under section 15 or by an order made by the Supreme Court of another jurisdiction under the corresponding law of that jurisdiction, or*
  - (e) *the scheme is disallowed under section 41 of the [Interpretation Act 1987](#).*
- (1B) *Subject to subsection (2), an interstate scheme remains in force in this jurisdiction until:*
  - (a) *the period specified under subsection (1) ends, or*
  - (b) *the scheme's operation in relation to this jurisdiction is terminated under section 16C, or*
  - (c) *the scheme ceases to have effect in the jurisdiction in which it was prepared, or*
  - (d) *the scheme is disallowed under section 41 of the [Interpretation Act 1987](#).*
- (2) *The Minister may, by notice published in the Gazette, extend the period for which a scheme is in force. The notice must be published on or before the day when the original period ends.*
- (3) *Only one extension may be effected under subsection (2) in respect of any particular scheme, and the maximum period of such an extension is 12 months.*

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div3/sec32>

- L. Sections 12GNA(2) of the *Australian Securities and Investments Commission Act 2001* (Cth), 137(2) of the *Competition and Consumer Act 2010* (Cth), and 1044B(2) of the *Corporations Act 2001* (Cth) provide for limited liability where a Professional Standards Scheme is prescribed in the relevant regulation. The Scheme does not apply to limit any liability under a Commonwealth law unless it has been prescribed under regulations by the Commonwealth.



- The Commonwealth *Treasury Legislation Amendment (Professional Standards) Act 2004* complements the Professional Standards Legislation in each state and territory, in that it allows professional standards Schemes to cap liability for misleading or deceptive conduct in certain cases under s.18 of the Australian Consumer Law (sched. 2 to the *Competition and Consumer Act 2010*), s.1041H of the *Corporations Act 2001*, and s.12DA of the *Australian Securities and Investments Commission Act 2001*. Note that the Commonwealth Act does not impose the limitation of liability: the Professional Standards Legislation of a state or territory will only apply where Commonwealth regulations have prescribed that an approved Scheme will limit liability for misleading or deceptive conduct. The *Treasury Laws Amendment (Professional Standards Schemes) Regulation* (for a particular year) makes amendments to the *Corporations Regulations 2001*, the *Competition and Consumer Regulations 2010* and the *Australian Securities and Investments Commission Regulations 2001* to prescribe approved Schemes. Amendments to the regulations are typically published semi-annually. An occupational association that wishes to have an approved Scheme prescribed under Commonwealth law may ask the Professional Standards Council to which its application is submitted to pursue prescription on its behalf or, alternatively, may negotiate directly with the Commonwealth Treasury.

## THE [NAME OF OCCUPATIONAL ASSOCIATION] PROFESSIONAL STANDARDS SCHEME

### 1. Occupational association

- 1.1 The [name of occupational association] Professional Standards Scheme (the Scheme) is a Scheme under the [*Name of Act under which the instrument is prepared*] (the Act) prepared by the [name of occupational association][acronym of occupational association] whose business address is: [insert business address].

#### **7 Preparation and approval of schemes**

- (1) An occupational association may prepare a scheme.  
(2) The Council may, on the application of an occupational association, prepare a scheme.  
(3) The Council may, on the application of an occupational association, approve a scheme prepared under this section.  
(4) A scheme prepared under this section may indicate an intention to operate as a scheme of this jurisdiction only, or of both this jurisdiction and another jurisdiction.  
<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div1/sec7>

#### **Section 4: Definitions**

**occupational association** means a body corporate:

- (a) which represents the interests of persons who are members of the same occupational group or related occupational groups, and  
(b) the membership of which is limited principally to members of that occupational group or those occupational groups.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part1/sec4#/part1/sec4/subSec1/!occupationalliability>



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## 2. Persons to whom the Scheme Applies

- 2.1 The Scheme applies to all members of [occupational association] who are [state whether it is *all* members, or a class or classes of members].
- 2.2 [Where the Scheme makes provision for exemption, add:] A person referred to in clause 2.1 may, on application, be exempted from participation in the Scheme by the [acronym of occupational association] with effect from the date specified by the [acronym of occupational association].

### ***Section 17: Persons to whom scheme applies***

- (1) A scheme may provide that it applies to all persons within an occupational association or to a specified class or classes of persons within an occupational association.
- (2) A scheme may provide that the occupational association concerned may, on application by a person, exempt the person from the scheme.
- (3) A scheme ceases to apply to a person exempted from the scheme as referred to in subsection (2) on and from the date on which the exemption is granted or on and from a later date specified in the exemption.
- (4) Subsection (2) does not apply to a person to whom a scheme applies by virtue of section 18, 19 or 20.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div2/sec17>

## 3 Jurisdiction

- 3.1 The Scheme applies in [jurisdiction in which the Scheme is made].
- 3.2 [Only include this provision if relevant] In addition to [jurisdiction listed in [3.1]], the Scheme is intended to operate in [insert the other jurisdictions in which the Scheme will apply under the provisions for mutual recognition contained in the Act] 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.

### ***7(4) Preparation and approval of schemes***

- (4) A scheme prepared under this section may indicate an intention to operate as a scheme of this jurisdiction only, or of both this jurisdiction and another jurisdiction.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div1/sec7>

## 4 Limitation of liability

- 4.1 This Scheme only affects the liability for damages arising from a single cause of action to the extent to which the liability results in damages exceeding [specify amount below which liability cannot be limited by the Scheme, in any case no less than \$500,000].



#### **26 Liability that cannot be limited by a scheme**

- (1) A scheme can only affect the liability for damages arising from a single cause of action to the extent to which the liability results in damages exceeding such amount (but not less than \$500,000) as is determined for the purposes of the scheme by the Council and specified in the scheme.
- (2) In making a determination, the Council must have regard to:
  - (a) the number and amounts of claims made against persons within the occupational association concerned, and
  - (b) the need to adequately protect consumers.
- (3) A Council determination:
  - (a) takes effect when an amendment providing for its specification in the scheme takes effect, and
  - (b) applies only to a cause of action that arises after the determination takes effect.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div2/sec26>

- 4.2 [Where the Scheme limits liability by reference to insurance arrangements, add:] If a person who is, or was, at the time of the act or omission giving rise to occupational liability, a person to whom the Scheme applies, or applied, and against whom a proceeding relating to occupational liability is brought, is able to satisfy the court that such person has the benefit of an insurance policy:

- (a) of a kind which complies with the standards determined by the [acronym of occupational association],
- (b) insuring such person against the occupational liability to which the cause of action relates, and
- (c) under which the amount payable in respect of that occupational liability is not less than the applicable monetary ceiling specified in clause 4.3 of this Scheme,

then that person is not liable in damages in relation to that cause of action above the monetary ceiling specified in clause 4.3 of this Scheme.

#### **21 Limitation of liability by insurance arrangements**

A scheme may provide that if a person to whom the scheme applies and against whom a proceeding relating to occupational liability is brought is able to satisfy the court that:

- (a) the person has the benefit of an insurance policy insuring the person against the occupational liability to which the cause of action relates, and
- (b) the amount payable under the policy in respect of that occupational liability is not less than the amount of the monetary ceiling specified in the scheme in relation to the class of person and the kind of work to which the cause of action relates, the person is not liable in damages in relation to that cause of action above the amount of that monetary ceiling.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div2/sec21>

- 4.3 The monetary ceiling is \$ [insert amount, or insert table if more than monetary ceiling applies to specific classes of members].

#### **24 Specification of limits of liability and multiples**

- (1) A scheme may:



(a) specify the same maximum amount of liability in relation to all cases to which the scheme applies or different maximum amounts of liability for different cases or classes of case or for the same case or class of case for different purposes...

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-081#sec.24>

- 4.4 Clause 4.2 does not limit the amount of damages to which a person to whom the Scheme applies is liable if the amount is less than the amount specified for the purpose in this Scheme in relation to a person to whom the Scheme applies.
- 4.5 This Scheme limits the occupational liability in respect of a cause of action founded on an act or omission occurring during the period when the Scheme was in force of any person to whom the Scheme applied at the time the act or omission occurred.

**28 Limit of occupational liability by schemes**

(1) To the extent provided by this Act and the provisions of the scheme, a scheme limits the occupational liability, in respect of a cause of action founded on an act or omission occurring during the period when the scheme is in force, of any person to whom the scheme applied at the time when the act or omission occurred.

(2) The applicable limitation of liability is the limitation specified by the scheme as in force at the time at which the act or omission giving rise to the cause of action concerned occurred.

(3) A limitation of liability that, in accordance with this section, applies in respect of an act or omission continues to apply to every cause of action founded on it, irrespective of when the cause arises or proceedings are instituted in respect of it, and even if the scheme has been amended or has, in accordance with section 32, ceased to be in force.

(4) A person to whom a scheme applies cannot choose not to be subject to the scheme, except in accordance with provisions included in the scheme under section 17 (2).

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div3/sec28>

- 4.6 Notwithstanding anything to the contrary contained in this Scheme if, in particular circumstances giving rise to occupational liability, the liability of any person who 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 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.

- In the Councils' view, variations in the liability cap in different Schemes that might apply to the same defendant, particularly for multi-jurisdictional entities, have the potential to generate a degree of uncertainty. The Councils have suggested that a means of addressing this perceived problem is to include provisions in Schemes that attempt to deal with the situation where two Schemes, with different liability caps, potentially apply. So, from the Councils' perspective, this clause reduces uncertainty in the interests of consumers, particularly where an intra-jurisdictional aspect of a dispute arises.

- 5 [Where the Scheme makes provision for higher discretionary limits, add the following section] **Conferral of discretionary authority**



- 5.1 The [acronym of occupational association] has discretionary authority, on application by a person referred to in clause 2.1, to specify in relation to that person a higher maximum amount of liability than would otherwise apply under the Scheme, in all cases or in any specified case or class of case.

**24 Specification of limits of liability and multiples**

(1) A scheme may:

(a) ....

(b) confer a discretionary authority on an occupational association, on application by a person to whom the scheme applies, to specify in relation to the person a higher maximum amount of liability than would otherwise apply under the scheme in relation to the person either in all cases or in any specified case or class of case.

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-081#sec.24>

**6 Commencement and Duration**

- 6.1 The Scheme will commence [following subclauses to be modified if Scheme is not multijurisdictional, as appropriate]:

6.1.1 in New South Wales, the Northern Territory, Tasmania, Western Australia, Victoria, and Queensland on [date month year]; and

6.1.2 in the Australian Capital Territory and in South Australia, on this same date, or such other later date, provided the date is specified in the relevant Minister's notice in relation to the Scheme; or

6.1.3 in all other cases, subject to the statutory provisions of each applicable jurisdiction.

**14 Commencement of schemes**

(1) A scheme published in the Gazette with the authorisation of the Minister commences:

(a) on such day subsequent to the date of its publication as may be specified in the scheme, or

(b) if no such day is specified--2 months after the date of its publication.

(2) This section is subject to any order made by the Supreme Court under section 15 and any order made by the Supreme Court of another jurisdiction under the corresponding law of that jurisdiction.

(3) In this section, a reference to a scheme includes, in the case of an interstate scheme, a reference to an instrument amending that scheme.

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-081#sec.14>

- In NSW, Tas, NT, Qld and WA a Scheme published in the Gazette with the authorisation of the Minister commences on such day subsequent to the date of its publication, as may be specified in the Scheme. In SA and the ACT, the Minister may specify the commencement date by notice. In Vic, a Scheme published in the Gazette with the authorisation of the Minister will commence 2 months or more *after* the date of its publication, as may be specified in the Scheme.





- In all jurisdictions, if a Scheme does not specify a commencement date (or, in SA or the ACT, the Minister does not specify such a date in the notice), or the Scheme is not notified in sufficient time for its intended commencement date to be met, then the Scheme will commence 2 months after its date of publication/notification. The relevant provisions of the Professional Standards Legislation are set out in the table below:

NSW	ACT	NT	QLD	SA	TAS	VIC	WA
s 14	Sch 4 s 4.11	s 14	s 15	s 15	s 15	s 15	s 27

6.2 The Scheme will be in force in all applicable jurisdictions for [specify number of years' duration, being five or less] years from the date of its commencement in [jurisdiction in which the Scheme was made]

6.3 Clause 6.2 is subject to the provisions of each jurisdiction in relation to the revocation, extension, or cessation of a Scheme.

### **32 Duration of scheme**

(1) A scheme must specify the period (not exceeding 5 years) for which it is to remain in force after its commencement.

(1A) Subject to subsection (2), a scheme (other than an interstate scheme) remains in force until:

(a) the period specified under subsection (1) ends, or

(b) the scheme is revoked, or

(c) the scheme's operation ceases because of the operation of another Act, or

(d) the scheme is declared void, either by an order made by the Supreme Court under section 15 or by an order made by the Supreme Court of another jurisdiction under the corresponding law of that jurisdiction, or

(e) the scheme is disallowed under section 41 of the *Interpretation Act 1987*.

(1B) Subject to subsection (2), an interstate scheme remains in force in this jurisdiction until:

(a) the period specified under subsection (1) ends, or

(b) the scheme's operation in relation to this jurisdiction is terminated under section 16C, or

(c) the scheme ceases to have effect in the jurisdiction in which it was prepared, or

(d) the scheme is disallowed under section 41 of the *Interpretation Act 1987*.

(2) The Minister may, by notice published in the *Gazette*, extend the period for which a scheme is in force. The notice must be published on or before the day when the original period ends.

(3) Only one extension may be effected under subsection (2) in respect of any particular scheme, and the maximum period of such an extension is 12 months.

<https://legislation.nsw.gov.au/#/view/act/1994/81/part2/div3/sec32>

## **7 Definitions**

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

[Include if applicable] "corresponding laws" means [include legislation for each jurisdiction in which the Scheme applies, other than the jurisdiction where the Scheme was made] the *Professional Standards Act 1994* (NSW) *Professional Standards Act 2003* (Vic), the *Professional Standards Act 2004* (Qld), the



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*Professional Standards Act 2004 (SA), the Professional Standards Act 1997 (WA), the Professional Standards Act 2005 (Tas), the Professional Standards Act (NT), and the Civil Law (Wrongs) Act 2002 (ACT)*

“court” has the same meaning as it has in the Act

“damages” has the same meaning as it has in the Act

“occupational Liability” has the same meaning as it has in the Act

“person” means an individual or a body corporate

## **5. Organising the application submission**

The information being requested is freestanding and can be completed and provided to the Councils on its own or alongside some or all other application modules/submodules.

For this reason, your submission responding to the submodule should have its own table of contents, body and attachments, and should avoid cross-referencing other application modules prepared by your association. This allows for the submodule to be assessed and analysed as a discrete submission to Councils.

## **6. Application to remake or amend a Professional Standards Scheme**

For an application to remake or amend a Professional Standards Scheme, the submodule and guidance set out the Scheme instrument information required by the Councils.

Before starting the submodule, you need to confirm the Councils’ requirements for your remake application with the Professional Standards Authority. If your association has previously provided the information and data sought in this submodule to the Councils, whether in an 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 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 this submodule, 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).