

3.0.2 Guidance

Members, or class of members, participating in the Scheme

For Schemes being prepared under Professional Standards
Legislation

June 2021





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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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Pilot



1. Guidance statement

A key aim of this guidance is to assist your association in completing Module 3.0 *Members, or class of members, eligible to participate in the Scheme*. This covers the information on your association's members, or class of members, who are eligible to participate in the Professional Standards Scheme.

Your association should submit this information to the Professional Standards Councils when seeking approval for a Scheme. This information assists the Councils to determine whether a proposed Scheme complies with the requirements of the Professional Standards Legislation and whether the Councils should approve the proposed Scheme.

2. Purpose

The module requires that your association provide information about the types of membership, or classes of members, to whom the Scheme applies within the entirety of the association membership.

A Scheme should clearly define the members, or class of members, who will participate in the Scheme. This is a relevant consideration for Councils in the approval of a Scheme.

3. The members to whom the Scheme applies

The Professional Standards Legislation in each jurisdiction refers to persons whom a Scheme may apply - either to *all members* of the association, or to a specific class, or classes, of members. You should be able to provide evidence of the way in which your association specifies how its members fall into particular classes of membership (e.g. Constitution, by-laws, membership entry criteria). In order to be a specified class – that is, where the Scheme is not intended to apply to all members of the association - its members should be identifiable before the commencement of the Scheme. Any mechanism that allowed association members to elect which class they belonged to after commencement of a Scheme would not be valid under the legislation (see also the discussion of 'opt-in', under *Exemption from the Scheme*, below).

Note that references to the term "person" in the legislation includes natural persons (i.e. individuals) and corporate persons.

Corporate member-only Schemes

The Councils may consider a Scheme proposed by an association that only has corporate members. The association should demonstrate, through additional submissions to the Councils, that the association has a robust regulatory relationship with the corporate members including, but not limited to, effective conflicts of interest management by the corporate members; effective devolvement of regulatory responsibilities from the association to the corporate members in respect of their employees, usually in the form of an enforceable membership agreement; and effective professional risk management including codes of ethics/conduct, corporate member discipline, and consumer complaint resolution. Your association should contact the Authority before commencing an application, if your association only has corporate members, or plans to propose a Scheme only with corporate members.

The relevant statutory provisions are set out in the table below:



NSW	ACT	NT	Qld	SA	Tas	Vic	WA
ss 17 - 20	Sch 4 ss 4.15 - 4.16	ss 18 - 21	ss 19 - 21	ss 19 - 22	ss 20 - 23	ss 19 - 22	ss 30 - 33

4. Key requirements

a) Register of members

Your association is required to provide the Councils with the policy and processes relating to the register of members to whom the Scheme applies. The register will record the members or classes of members and the day on which the member became a participant in the Scheme and ceased to be a participant in the Scheme.

The Councils recommend that the register should be publicly searchable, so that consumers can ascertain whether their service provider is a participant in the Scheme. If the register is not publicly available, your association must provide the policy and procedures to allow consumers, and other persons with a legal right, to inquire whether a person is a participant in the Scheme, or was a participant on the Scheme at a specified time.

In addition, the Scheme participant register will assist the association to verify its participating member numbers, as part of its annual compliance reporting obligations to the Councils.

b) Exclusion from the Scheme

Your proposed Scheme may include a clause to exclude a class of members, or persons, from the Scheme. Where a Scheme excludes a class of members from the Scheme, they cannot participate in the Scheme. Exclusions from the Scheme must be abundantly clear to your members and to consumers. If a class of members is proposed to be excluded from a Scheme, the Councils will generally only approve such an exclusion where such members do not provide occupational services direct to consumers and do not present any risks to consumers.

Such members may not, for example, have the benefit of professional indemnity insurance in their own name, or as employees. For instance, members who are employed by government, educational entities, or inhouse professionals, or provide a type of work that cannot have its liability limited by the Scheme. It is not possible to exclude a type of occupational work from a Scheme, only to exclude all persons who provide that type of work.

Note that a member who is specifically excluded from the Scheme cannot apply to remove the exclusion.

c) Exemption from the Scheme

Exemption from a Scheme is not the same as being excluded from a Scheme. A Scheme may provide that the occupational association concerned may, on application by a person to whom the Scheme applies, exempt the person from the Scheme. Exclusion, on the other hand, means that the Scheme is not intended to (and does not) apply to the person.

NSW	ACT	NT	Qld	SA	Tas	Vic	WA
s 17	Sch 4 s 4.15	s 18	s 19	s 19	s 20	s 19	s 30



For consistency across all jurisdictions, an application for exemption from a member must be in writing and must be uniquely considered by the association. An exemption from a Scheme applies to the entire Scheme and cannot apply to parts of the Scheme. An exemption takes effect from a specified date agreed by the association and is a permanent exemption from the Scheme.

Your association must have procedures to advise the member in writing of the exemption from the Scheme, and the date of its commencement. Once a member has been exempted, they may only revoke the exemption by way of a written application to the association, seeking to reverse the exemption, from a specified date. Your association will need policies and processes to receive and consider exemption revocations.

The Councils will assume that, where the table submitted with the Module information indicates that the Scheme will apply to a class or classes of membership, that all members shown will participate in the Scheme, unless properly exempted. Persons to whom a Scheme applies cannot choose to participate in the Scheme (i.e. opt-in) or exempt themselves from the Scheme (i.e. opt-out); they participate in the Scheme unless they successfully apply to the association for exemption. The legislation does not allow for persons to either 'opt-in' or 'opt-out' of a Scheme and an instrument that anticipates such mechanisms will be non-compliant and cannot be approved.

Where provided for in the Scheme, your association must provide Councils with the policy and process for receiving and considering exemptions from the Scheme, including the terms of reference of the governing body, or committee which holds a delegation from the governing body, to receive and consider applications for exemption from the Scheme; any forms or information provided to members or published on your website regarding exemption from the Scheme; the grounds on which an application for exemption will be accepted; and the relevant member register demonstrating that a member is exempt from the Scheme.

d) Higher discretionary caps

A Scheme may 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 to the person.

NSW	ACT	NT	Qld	SA	Tas	Vic	WA
s 24	Sch 4 s 4.20	s 25	s 25	s 26	s 27	s 26	s 37

A higher maximum amount of liability may apply to all work, or types of work, or for a class or particular consumer; it may be for a specified period, or from a specified date until the Scheme expires. Your association must provide its policy and processes for accepting, considering and deciding upon a requested higher monetary ceiling, including requiring the member to demonstrate the requisite professional indemnity insurance; advising the member in writing including specifying dates; and noting the member's status in the Scheme participant register.