

# SABAR

## **Public Consultation Document**

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## PURPOSE

The purpose of this Public Consultation Document is for the Professional Standards Councils (**Councils**) to seek comments and submissions from the public in considering an application for a professional standards scheme. This is a mandatory consideration for the Councils under section 9 of the *Professional Standards Act 2004* (SA) (**Act**), in that Councils is required as part of a process to give public notice explaining the nature and significance of the scheme. This document serves that purpose.

Public notification of a scheme does not necessarily mean the proposed scheme will be approved by the Councils and authorised by the relevant Attorneys General or Minister.

The South Australian Bar Association (**SABA**) has submitted an application to the Councils to approve a professional standards scheme (**Scheme**). The Councils is the body responsible for approving schemes under the Professional Standards Legislation.

Professional Standards Legislation is Australian state-based legislation. Its objects (generally across all jurisdictions) are:

- To protect the consumers of services provided by professionals
- To facilitate the improvement of occupational standards for professionals
- To enable the creation and approval of schemes to limit the liability of professionals to whom a scheme applies.

For a scheme to be approved under Professional Standards Legislation, the occupational association proposing the scheme must demonstrate a high commitment to professional standards and consumer protection, implement comprehensive risk management strategies and set professional indemnity insurance standards for scheme participants.

SABA's application is being considered by the Councils and is now available for public submissions and comments.

## HOW CAN I MAKE A COMMENT OR SUBMISSION?

Comments and submissions must be made in writing to the Chief Executive Officer, Professional Standards Councils, within 28 days of public notification.

The Professional Standards Councils is located at Level 2, St James Centre, 111 Elizabeth Street, Sydney, NSW, 2000.

Website: [www.psc.gov.au](http://www.psc.gov.au)

Email: [pscinfo@psc.gov.au](mailto:pscinfo@psc.gov.au)

Telephone: 1300 555 772 / (02) 8315 0800.

Comments and submissions received will be public, unless confidentiality is specifically requested, and will be subject to the *Freedom of Information Act 1991* (SA) and the *Privacy Act 1988* (Cth).

## BENEFITS OF A PROFESSIONAL STANDARDS SCHEME

### How will consumers benefit from the Scheme?

Consumers will benefit from the Scheme as it will assure consumers that barristers covered by the Scheme have high professional standards of practice that they must uphold and that SABA will monitor, enforce and improve those standards of practice by participating members.

The requirements for Scheme participants to be covered by an approved professional indemnity insurance policy provides another layer of protection for consumers.

### How does the Scheme enhance the professional standards of SABA members?

The Councils expect SABA, as an association seeking approval of a scheme, to demonstrate that Scheme participants can protect consumers and manage risk. SABA must regulate members to maintain and improve professional standards.

SABA has implemented a number of strategies and services aimed at enhancing the professional standards of Scheme participants. These include, but are not limited to, ensuring that members: (a) are appropriately qualified (that is, admitted as legal practitioners and holding current and unrestricted practicing certificates); (b) are suitably insured; (c) participate in continuing professional development; and (d) are subject to a complaints and disciplinary structure.

SABA has a Risk Management Plan which identifies the risks to professional standards by practising members, lists the strategies aimed at mitigating those risks and the means by which those strategies will be implemented. Scheme participants are subject to SABA's compliance activities, including via annual audits, to ensure their compliance with their professional obligations, along with those undertaken by statutory regulatory bodies.

### How does limiting participant liability help consumers?

Limiting liability helps to underpin the availability of sustainable and affordable professional indemnity insurance for Scheme participants. This ensures that consumers of professional services will receive timely and fair compensation for legitimate claims.

In return for the benefit of limited liability, Scheme Participants are required to meet the professional standards and conduct expected of a profession. This means that participation in a scheme enhances: (a) the quality of the services provided by members to their clients; (b) consumer protection for clients of legal services through compulsory insurance; and (c) the viability of scheme participants to run an efficient and reliable practice that in turn ensures that consumers have access to appropriately qualified, regulated and monitored barristers to support the principles of access to justice.

### Is the Scheme professional indemnity insurance?

No, the Scheme is not a source of professional indemnity insurance.

Professional indemnity insurance provides indemnity to legal practitioners in relation to their civil liability. Every practising legal practitioner, including a barrister, is required to maintain professional indemnity insurance in order to practise in South Australia. In contrast, the Scheme caps the civil liability of participating members and participation in it provides an additional layer of protection.

For a Scheme participant to be able to limit liability under the Scheme they must hold professional indemnity insurance that meets certain requirements. This includes that the amount payable under the policy, after legal costs, must not be less than the amount for which liability is limited under the Scheme.

### Continuing Educational Program

Continuing professional development (CPD) is an important professional obligation on Scheme participants to ensure their skills and knowledge are maintained and updated.

Members are required, under the LPEAC Rules, to earn at least 10 CPD units each year. The CPD activities undertaken must include 1 unit in each of the following areas:

- Practical Legal Ethics
- Practice Management and Business Skills
- Professional Skills
- Bullying, Discrimination and Harassment (*new in 2021*).

SABA requires its members to undertake a minimum of 5 units of Bar-Sponsored CPD Activity each year (included in the overall 10-unit total), and such activity can include attendance at free SABA CPDs or the Annual Conference.

The SABA CPD program mitigates occupational risks whilst improving professional standards and providing consumer protection. The program is of direct relevance to practice as a barrister and ensures members maintain currency of knowledge, including as to changes in law and regulation, professional and ethical standards and advocacy skills.

SABA monitors Scheme participants' compliance with its CPD requirements, including via the eligibility of members to renew their practising certificates annually. This ensures that consumers are served by highly competent, professional and ethical practitioners and minimises the risk of claims arising.

### Complaints and Discipline System

Scheme participants are subject to the complaints and disciplinary system under the Legal Practitioners Act. The primary complaints handling body is the Legal Profession Conduct Commissioner. Anyone can make a complaint about the professional conduct of a legal practitioner, including a barrister, and the process is outlined on the LPCC's website.

SABA members are also subject to the Barristers' Conduct Rules, which set out the minimum ethical standards expected of them. The Professional Responsibility Committee is charged with

the handling of any potential breach of the Conduct Rules by a member in the first instance and, if appropriate, prosecuting a complaint before the Bar Council. If a member is proven to be in breach, Bar Council may impose a range of disciplinary actions as it sees fit, including suspension and expulsion of that member from the Association and the Roll of Counsel.

SABA also has a separate procedure to deal with grievances concerning sexual harassment, workplace bullying and discrimination, a copy of which is available on its website.

The Professional Standards Committee is responsible, in the first instance, for the handling of any potential breaches of compliance with member obligations under the Scheme. By taking action if the expected standards are not met, SABA demonstrates and improves the professionalism of members.

## THE SCHEME

### What is a professional standards scheme?

A professional standards scheme is a legal instrument that obliges an association to monitor, enforce and improve the professional standards of its members. This is designed to help protect the consumers who use their members' services.

A scheme caps the civil liability or the amount of damages that may be paid by a professional who is covered by an association's scheme if a court upholds a claim against them.

The Councils are statutory bodies established by the Australian state and territory governments under professional standards legislation to promote professional standards and provide consumer protection. They do this by supervising the preparation and approval of schemes and monitoring the improvement of occupational standards by associations.

More information on the Councils and schemes can be found at <https://www.psc.gov.au>.

### What is the SABA Scheme?

SABA members who hold a current practising certificate and approved professional indemnity insurance have their occupational liability for damages limited to \$1.5 million. It does not limit liability for damages arising from death or personal injury to a person, a breach of trust, fraud or dishonesty.

### Who administers the Scheme?

SABA's Executive Officer has responsibility for administering the Scheme. The Professional Standards Committee and ultimately SABA's Bar Council monitors and ensures compliance with the requirements set out in the Act. The address for Scheme management is 24 Flinders Street, Adelaide, South Australia.

## Who is SABA?

SABA is a voluntary professional association, established in December 1964, for members of the legal profession who practise exclusively as independent barristers in South Australia. It was incorporated on 19 March 1985.

The work and functions of SABA are guided by its Constitution. Its objects include:

- (a) to maintain high standards of professional conduct;
- (b) to promote fellowship and the exchange of views between members of the Association;
- (c) to conduct training for readers in the skills and practices of barristers, as well as facilitate professional development seminars for members and promote advanced advocacy skills;
- (d) to promote the administration of justice and law reform, and make recommendations with respect to legislation, evidence, procedure and court business;
- (e) to affiliate with other professional bodies to further the interests of practising barristers; and
- (f) to uphold and enhance relationships between barristers (and the Association) and the judiciary, the courts, governments and clients (including solicitors).

## Where does the Scheme operate?

The Scheme is intended to operate both in South Australia and in each of the other States and Territories of the Commonwealth of Australia.

## When will the Scheme apply?

It is proposed that the Scheme will commence on 1 July 2022 for a 5-year period.

## Does the Scheme apply to all members?

The Scheme applies only to the Ordinary Member class of members of SABA, which for the purposes of the Scheme includes Bar Reader Members in accordance with the SABA Constitution. These members, being the majority, are those who practise law exclusively as barristers and principally in South Australia and therefore hold professional indemnity insurance that complies with the *Legal Practitioners Act* in respect of a liability potentially limited by the Scheme.

## How does the Scheme operate?

The Scheme is designed to improve the occupational standards of barristers in South Australia and to protect their clients. SABA is obliged to monitor, enforce and improve the professional standards of its members.

The Scheme provides participants with the benefit of a statutory cap if damages are awarded against them because of a successful occupational liability claim. A person must have the benefit of an insurance policy to an amount at least equal to the liability cap (monetary ceiling) applying to that person at the relevant time.

Limiting liability both protects consumers and assists Scheme participants (see the various reasons outlined above under 'benefits of a scheme').

### How is the level of limited liability of participating SABA members determined?

The Scheme limits liability for damages to \$1.5 million for all Scheme Participants, provided the barrister has insurance which is not less than \$1.5 million and unless a discretionary higher limit is fixed upon application for an individual. Liability is limited in this way because insurance is already compulsory for all South Australian legal practitioners, insurance is available and affordable to all barristers through the Legal Practitioners Professional Indemnity Insurance Scheme and there has never been a successful claim against a South Australian barrister that has reached \$1.5 million in damages.

### Can a SABA member opt out of the Scheme?

A SABA member who is a participant in the Scheme cannot opt out. All Ordinary Members will be required to become Scheme Participants unless they apply for and are granted an exemption from the Scheme. In rare cases Scheme Participants may not be able to meet the professional indemnity insurance requirements (eg. senior counsel in government agencies, who are otherwise insured by the government insurer) or the nature of their practice may support an application not to have their liability limited. Any such application will be considered on a case-by-case basis.

### How will consumers know if a SABA member is covered by the Scheme?

Participants in the Scheme are required under professional standards legislation to disclose their limited liability status on all documents given to current or prospective clients that promote or advertise their occupation as a barrister. The prescribed statement is: "Liability limited by a scheme approved under Professional Standards Legislation".

Disclosure should appear on the following:

- Letterhead and letters
- Fax cover sheets
- Emails
- Written advice
- Memorandum of fees and invoices unaccompanied by a separate document with the disclosure statement
- Newsletters and other publications
- Websites

Disclosure need not appear on advertisements, social media accounts or business cards.

A fact sheet on the disclosure requirements is available from the Councils' website and SABA directs all new members to this information upon joining the Scheme.

It is an offence for a participant not to disclose their limited liability status and SABA conducts an annual audit to ensure continued compliance by Scheme Participants.

### How long does the Scheme operate for?

It is proposed that the Scheme will operate for 5 years from its commencement.

## SABA AND ITS MEMBERS

### Who are SABA members?

SABA has 7 categories of membership, namely: ordinary, bar reader, interstate, international, associate, life and honorary members. Ordinary and bar reader members will hold current practising certificates issued under the *Legal Practitioners Act 1981* (SA) and be practising exclusively as barristers. Interstate and international members will be practising as a barrister in another State or Territory of the Commonwealth (and a member of their home association) or in a country outside of Australia. Those who have retired from legal practice, or from judicial office, and who have previously been an ordinary member are entitled to become an associate member. SABA may invite former ordinary members who have served in the judiciary of South Australia as a puisne justice for at least ten years to be a SABA life member, while those with distinguished service or contribution to the Bar, the Courts and/or the administration of justice may be admitted to honorary membership.

### What types of work do SABA members carry out?

The provision of counsel services, including appearing in courts and tribunals, providing opinions and settling legal documents.

## WHERE CAN I FIND MORE INFORMATION?

Information about SABA's current Scheme is available on its website at [www.sabar.org.au](http://www.sabar.org.au).

Otherwise, you can write to the Association via its Executive Officer using any of the following methods:

- Email: [sabar@sabar.org.au](mailto:sabar@sabar.org.au)
- Phone: (08) 8231 8153
- Address: PO Box 6279, Halifax Street, Adelaide SA 5000