



NEW SOUTH WALES
BAR ASSOCIATION®

PROFESSIONAL STANDARDS SCHEME

PUBLIC CONSULTATION DOCUMENT

The New South Wales Bar Association has prepared a professional standards scheme under the *Professional Standards Act 1994* (NSW).

Each state and territory has professional standards legislation to:

- protect consumers of professional services and other occupational services
- improve occupational standards
- allow scheme participants to limit their civil liability.

The Professional Standards Council of New South Wales invites public comments and submissions on our scheme by 20 November 2024.

Your comments will provide valuable insight into how consumers view and understand our proposed scheme. This will help the Council decide whether to approve the scheme or not. If Council approves the scheme, it will then need the relevant attorney-general or minister's authorisation.

This document covers:

1. The New South Wales Bar Association and our members
2. Our proposed scheme
3. The benefits of our scheme
4. Comments and submissions.

1. The New South Wales Bar Association and our members

Who is the New South Wales Bar Association?

The New South Wales Bar Association is an occupational association for barristers. It is a public company, limited by guarantee under the *Corporations Act 2001* (Cth) with general business and affairs managed by its board, called the Bar Council. The Bar Council is comprised of 21 barristers elected by the membership. The Bar Council is provided assistance by 25 specialist member committees comprised of barrister volunteers who offer their skills and expertise for the benefit of the public and the profession.

The Bar Association promotes the public good in relation to justice and the provision of legal services. This is achieved by promoting and maintaining the highest standards of excellence among local practising barristers. In pursuit of this objective, the Bar Association:

- Carries out its regulatory functions relating to NSW barristers under the *Legal Profession Uniform Law* through the work of the Bar Council and its committees
- Monitors educational qualifications and entry requirements through its Education Committee, and running the Bar Exams, Bar Practice Course and the Reading Program.
- Supports the standards of practising barristers by running the Continuing Professional Development program for barristers (CPD), the Ethical Guidance Scheme and the Mentoring Program
- Manages matters of professional discipline of barristers and the resolution of complaints against them through the work of Professional Conduct Committees and the Bar Council
- Co-ordinates pro bono or reduced-cost legal services to underprivileged sections of the community
- Operates the Bar Library
- Makes submissions and provides advice to government and government agencies on specific legal policy and practice issues as they arise
- Works with media organisations and other bodies in order to disseminate to the public the Bar Association's position on key issues
- Appoints senior counsel (SCs), barristers who have demonstrated outstanding skill as advocates and advisers in the administration of justice
- Promotes diversity and equality at the bar through its Best Practice Guidelines and other policies
- Supports the wellbeing of members

The Association also has an established Strategic Plan which will be in place until 2025. This strategic Plan focuses on the following:

1. Preserve the integrity, independence, ethics, service and excellence of the Bar;
2. Support barristers in the conduct of their profession;
3. Support barristers in the conduct of their practice; and
4. Reinforce the Bar Association as a representative organisation, a co-regulator, as a leader in the legal and broader communities and as an employer.

Who are our members?

The NSW Bar Association's members include Class A members, who are local practising barristers in NSW. The NSW Bar Association's Professional Standard scheme only applies to its members who hold a NSW barristers practising certificate and who hold professional indemnity insurance. The Association has a small number of Life Members, some of whom hold a NSW barristers' practising certificate who are covered by the Scheme.

Not all Class A members are covered by the Scheme, as some are Government barristers or Members of Parliament and as such do not provide legal services to private consumers and do not hold professional indemnity insurance.

The Association also has Class B members, who are other members who are not local practising barristers in NSW, and who are not covered by the Association's Scheme. These include:

- I) Legal Practitioners who are not NSW barristers (usually interstate barristers);
- II) Non-Practising Legal Practitioners (usually retired NSW barristers);
- III) Other persons (such as barristers' clerks)

What types of work do our members do?

Barristers are independent, specialist advocates who are trained to appear in a courtroom, in commissions of inquiry and alternative forms of dispute resolution. They may also provide objective advice on particular legal problems for clients, solicitors, businesses and governments.

2. Our proposed scheme

What is a professional standards scheme?

A professional standards scheme is a legal instrument that limits the damages that eligible members of an occupational association can be liable for if a claim is made against them. An association with an approved scheme must comply with statutory reporting obligations and explain to the relevant Professional Standards Council how it is regulating members and making improvements in professional standards and consumer protection.

An association usually applies for a scheme in the state or territory in which it operates or is incorporated and can operate for up to five years. However, the scheme can also operate in other states and territories if approval is granted by the relevant Professional Standards Council.

The Professional Standards Councils are independent statutory bodies established in each state and territory. They have specific responsibilities under professional standards legislation for assessing and approving applications for, and supervising the application of, professional standards schemes.

The functions of the Professional Standards Councils are set out in s43 of the *Professional Standards Act 1994* (NSW). The Professional Standards Councils play a key role in improving professional standards and protecting consumers by:

- Monitoring how well associations and their members meet the standards demanded by their professional standards schemes
- Providing Ministers with advice regarding the professional standards of members of professional associations, including the operation of professional standards schemes
- Encouraging and promoting the self-regulation of professional associations
- Overseeing the strategy for research, education and thought leadership in professional standards and regulation
- Determining future projects to raise the capacity of occupational associations to improve professional standards.

Professional Standards legislation provides for a Professional Standards Council in each jurisdiction to approve and monitor professional standards schemes that limit civil liability of professionals and members of occupational associations and groups. The Professional Standards legislation also aims to facilitate improvement in the standards of services provided by the members of occupational associations and groups.

What is the New South Wales Bar Association's scheme?

The New South Wales Bar Association professional standards scheme is a scheme under the *Professional Standards Act 1994* (NSW) prepared by the New South Wales Bar Association. The scheme applies to all

members of the New South Wales Bar Association who hold a New South Wales barrister's practising certificate issued by the New South Wales Bar Association and who have professional indemnity insurance.

How does the scheme operate?

The New South Wales Bar Association's professional standards scheme operates to improve the occupational standards of barristers and to protect consumers of their services. The Scheme also limits the civil liability of barristers to whom it applies to the monetary limit specified in the professional standards scheme, which is \$1,500,000. That is, members of the association who hold a current practising certificate and approved professional indemnity insurance have their occupational liability for damages limited to \$1.5 million.

Participating members of the scheme must display a disclosure statement that states "*Liability limited by a scheme approved under Professional Standards Legislation*" on all business documents given or caused to be given to current or prospective clients. When consumers read this disclosure statement they are made aware of the professional standards scheme and can obtain further information about the scheme through the Professional Standards Authority or the Association's website. Any enquiries made will reveal the protection they are afforded if a member barrister breaches their duties as a barrister with a consumer.

The scheme also imposes obligations on the Association to:

- Maintain a system for investigating and resolving complaints by consumers about NSW barristers
- Ensure minimum standards of professional indemnity insurance held by NSW barristers to protect consumers
- Ensure continuing professional education of barristers, including on areas identified as risks to the professional standards of barristers
- Use evidence, including insurance claims data and complaints data to identify new and emerging risks and develop, implement and monitor strategies to address these risks

Who administers the scheme?

Responsibility for administration of the scheme and ensuring that it complies with the requirements of the *Professional Standards Act 1994* (NSW) and of the Professional Standards Council rests with the Executive Director of the New South Wales Bar Association who is assisted on a day to day basis by the Manager of Professional Standards and Membership together with numerous other staff, Committees and working groups.

The address of the New South Wales Bar Association is Selborne Chambers, B/174 Phillip Street, Sydney New South Wales 2000.

Where does the scheme operate?

In addition to New South Wales, the scheme is intended to operate in Victoria, Western Australia, Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania.

When will the scheme apply?

The scheme is intended to commence on 1 July 2025 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 pursuant to s32 of the *Professional Standards Act 1994* (NSW).

Does the scheme apply to all members?

The occupational group that are members of the New South Wales Bar Association Professional Standards Scheme are:

- all members of the NSW Bar Association who hold a New South Wales barrister's practising Certificate issued by the New South Wales Bar Association and

- who have professional indemnity insurance that is required under law to be held by New South Wales barristers in order to practise.

All other members are not covered by the Scheme.

How is participating members' level of limited liability determined?

All participating members have the same limit of liability - \$1.5m.

Can a New South Wales Bar Association member leave the scheme?

Eligible members cannot apply for exemption from the Scheme. A New South Wales Bar Association member can leave the scheme but only if they cease to practice at the private bar (ie they become a government barrister) or if they cease to hold a New South Wales barrister's practising certificate.

How will consumers know if a New South Wales Bar Association member is covered by the scheme?

All New South Wales Bar Association members who are covered by the scheme are informed when they renew their practicing certificate that they are required to insert the mandatory disclosure statement on all material given (or caused to be given) by members of an association to clients or prospective clients that promote or advertise the person or their occupation.

Further information and reminders about the mandatory disclosure statement requirements are made available to members:

- on the NSW Bar Association website;
- in the Bar Practice Course;
- regularly in InBrief; and
- in the two annual mandatory disclosure statement member audits. All barristers are required to confirm they have displayed the statement on business documents annually, and 10% are audited and required to produce records annually.

Having the above structure in place ensures members are well aware of the requirement to use the mandatory disclosure statement.

3. The benefits of our scheme

How will consumers benefit from the scheme?

The main objectives of professional standards schemes are:

- to ensure associations deliver ongoing improvements in consumer protection;
- to limit civil liability but ensure insurance is in place to meet the needs of consumers if a claim is made against a member by a consumer; and
- to improve and uphold professional standards.

The New South Wales Bar Association has implemented structures and processes to ensure that the above objectives of a professional standards scheme are met by establishing:

- working groups;
- committees;
- well-trained teams; and
- excellent working relationships with each professional indemnity insurer.

The New South Wales Bar Association ensures a whole-of-organisation approach to maintaining the highest standards of excellence among NSW barristers generally as well as members of the professional standards scheme. The approach taken encompasses a wide range of activities, such as legal education, ethical

guidance, entry requirements, conducting investigations, mentoring and issuing relevant best practice guidelines as and when required.

As the administrator of the professional standards scheme, the New South Wales Bar Association obtains data from disciplinary complaints and professional indemnity insurance claims, and analyses that data in order to identify emerging risks. Once a new risk is identified a root cause analysis is undertaken and measures put in place to minimise and manage the risk going forward including by continuing professional development and actively communicating with barristers to ensure consumers are protected.

The professional standards regime also requires the New South Wales Bar Association to provide adequate continuing professional development generally and maintain a complaints and discipline system. This allows consumers to be confident that barristers in New South Wales are competent and if any issues arise complaints can be dealt with in an efficient and effective manner.

The professional standards regime also requires the NSW Bar Association to report annually on its continuing improvement and compliance with Scheme requirements, including reporting on new and emerging risks and related risk treatment plans for NSW barristers.

How does the scheme enhance our members' occupational standards?

The *Professional Standards Act 1994 (NSW)* imposes obligations on the NSW Bar Association including in respect to:

- ongoing risk management;
- maintenance of insurance standards to protect consumers
- dealing with complaints and disciplinary matters; and
- regular reporting.

Consequently, the New South Wales Bar Association continually reviews current processes, the scheme itself, analyses data received from many different sources and makes appropriate improvements in relation to occupational standards. The work undertaken is then captured and reported on annually in the APSR that is submitted to the Professional Standards Authority with feedback received from the Professional Standards Authority in respect to same.

The work undertaken by the New South Wales Bar Association is then reviewed and captured again every five years when an application for a new professional standards scheme is being made to the Professional Standards Council in New South Wales.

In addition, there is a comprehensive set of legislation that regulates barristers. This means that barristers have to adhere to the requirements of the scheme as well as adhere to the legislation that has been enacted to ensure barristers meet the highest standards possible. The legislative regime also imposes obligations on the New South Wales Bar Association as the regulator of barristers to ensure barristers are adhering to the legislative requirements. Consequently, this provides consumers with dual protection and ensures to the extent possible that members occupational standards are being met.

How does limiting participant liability help consumers?

One of the central features of a professional standard scheme is that it limits the civil liability of professionals who take part in them. That is, the amount of damages that a court can award a client if they succeed in certain claims against a professional is capped.

The limitation of liability limits professional indemnity insurance (PII) insurer risk which ensures a viable and sustainable PII market in Australia. PII is the fundamental protection for consumers to be able to recover for loss from negligence arising from professional services and as such a viable PII market is fundamental to consumer protection.

The current and proposed New South Wales Bar Association professional standards scheme has a limit of \$1.5 million. That means, a consumer is entitled to commence proceedings against a barrister and claim damages if they have failed to discharge their duties properly and will be entitled to receive a maximum of \$1.5 million if the client's proceedings are successful.

The professional standards scheme ensures professional indemnity insurance is in place and imposes obligations on the scheme administrator to review claims made, identify risk and minimise (to the extent possible) claims being made going forward through education and regular communication with members.

This in turn ensures premiums are kept as low as possible, premium increases are scrutinised to ensure the cap is reasonable and appropriate and premiums remain affordable to members. This then allows more barristers to be able to practise, which increases competition and provides consumers with a larger choice of barristers and improves access to justice, which is a fundamental part of the good functioning of Australian society.

Without the professional standards scheme operating premiums may become too high for barristers to afford which could lead to a reduction in the number of barristers available to service consumers.

Barristers in NSW are regulated by the *Legal Profession Uniform Law*.

Is the scheme a professional indemnity insurance scheme?

The professional standards scheme of the New South Wales Bar Association applies to all members of the Bar Association who hold a barrister's practising certificate issued by the Bar Association and who have professional indemnity insurance that is required under law to be held by New South Wales barristers in order to practise.

The scheme only affects the liability for damages arising from a cause of action to the extent to which the liability results in damages exceeding \$1,500,000.

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 New South Wales Bar 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 of the scheme, then that person is not liable in damages in relation to that cause of action above the monetary ceiling which is \$1,500,000.

Having the monetary ceiling and the professional standards scheme regime in place encourages scheme administrators and professional indemnity insurers to work closely together in order to minimise claims going forward. This results in premiums being kept low for members as both the scheme administrator and the insurers have a vested interest in this occurring. If members have affordable professional indemnity insurance consumers may then benefit if a claim is made.

The limitation of liability limits PII insurer risk which ensures a viable and sustainable PII market in Australia. PII is the fundamental protection for consumers to be able to recover for loss from negligence arising from professional services and as such a viable PII market is fundamental to consumer protection.

What continuing education can members access?

A core objective of the New South Wales Bar Association is to promote, maintain and improve the standards of local practising barristers. The Professional Standards and Support Department achieves this by organising the Bar exams, the Bar Practise Course, Reading Program, mentoring and the continuing professional development program (CPD).

CPD's are run either online or in person. Most CPD's are recorded and made available to members on the New South Wales Bar Association website. CPD's are also run regionally annually as part of the NSW Bar Association's annual CPD Conference Series.

As required by s9 of the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW), CPD's cover the following categories:

- Substantive Law, Practice and Procedure and Evidence
- Practice Management and Business Skills
- Barristers' Skills
- Ethics and Professional Responsibility.

Having an extensive CPD program ensures barristers are kept up-to-date on changes in the law and this consequently reduces occupational risk, improves professional standards and provides protection to consumers.

The NSW Bar Association also targets its CPD Program to new and emerging professional standards risks. This can involve bespoke CPDs or CPD series on particular topics identified as risk areas, or inclusion in the annual CPD Conference Series.

How are complaints and discipline managed?

The New South Wales Bar Association's disciplinary regime and complaints handling procedures serve to improve the professional standards of New South Wales barristers, to protect consumers and maintain high standards of professional conduct. This is primarily achieved through the application of all relevant legislation including:

- the *Legal Profession Uniform Law (NSW) (LPUL)*;
- the *Legal Profession Uniform Law Application Act 2014 (NSW)*;
- the *Legal Profession Uniform General Rules 2015 (NSW)*;
- the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)*; and
- the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015 (NSW)*.

The New South Wales Bar Association's Professional Conduct Department, together with the Professional Conduct Committees (PCC's), facilitate the investigation of conduct complaints referred to the Bar Council by the Office of the Legal Services Commissioner (**OLSC**). The Bar Council may also initiate its own complaint against a barrister, which is made to the OLSC and then usually referred back to the Bar Council for investigation.

Therefore, consumers can access the NSW Bar Association's complaints and discipline system by first lodging a complaint about a NSW barrister with the OLSC.

On receipt of a complaint from the OLSC, the Director of Professional Conduct allocates the complaint to one of the four PCC's that have been established. The four PCC's are comprised of practising barrister members as well as three community members who are there to bring the community perspective to the complaint process.

The PCC's report can make recommendations to the Bar Council as to the appropriate outcome of complaints, but the Bar Council remains the ultimate decision maker. Where egregious conduct on the part of the barrister is established, the complaints are resolved by remedial or disciplinary action being taken against the barrister by the Bar Council.

The Bar Council may make a finding of unsatisfactory professional conduct or, if the matter is more serious, commence proceedings in the NSW Civil and Administrative Tribunal (**NCAT**) where a finding of Professional Misconduct may be sought. NCAT has largely the same powers as the Bar Council to make protective orders in

cases which warrant action being taken, but may also recommend that the barrister's name be removed from the Roll of Practitioners held by the Supreme Court. In those cases, the Bar Council will commence separate proceedings in the Court of Appeal.

Disciplinary decisions made by the Bar Council may be appealed to NCAT by the barrister. NCAT decisions are appealed to the Court of Appeal. A complainant may apply to the OLSC for a review of a decision by the Bar Council.

The Professional Conduct team monitors the number and types of complaints and disciplinary matters and this data is analysed along with data received from each of the professional indemnity insurers to identify major or recurring professional standards risks. Education programmes to address these risk areas are developed to improve professional standards. Problems identified through analysis of complaints and disciplinary data are also addressed in articles published in the New South Wales Bar Association's journal, Bar News and in notices issued in the electronic newsletter InBrief.

4. Comments and submissions

How can I make a comment or submission?

In your submission, you may wish to respond to the following questions:

- Are you a member of the New South Wales Bar Association?
- Are you already a consumer of the type of services covered by the proposed scheme?
- Do you think the scope of the scheme is clear? (including work, jurisdictions and membership classes covered)
- Is it clear how you, as a member or consumer, could make a complaint?
- Can you describe how consumers would benefit from the New South Wales Bar Association's members' services being covered by a scheme?

Please send comments and submissions (preferably as a letter) to:

The Chief Executive Officer

Professional Standards Councils

Level 2, St James Centre

111 Elizabeth Street

Sydney NSW 2000.

You can also contact the Councils by:

- email: <mailto:pscinfo@psc.gov.au>
- phone: 1300 555 772 or (02) 8315 0800
- website: www.psc.gov.au.

How are comments and submissions managed?

The Council must consider all comments and submissions it receives, in line with the public consultation process under sections 8, 9 and 10 of the Professional Standards Act 1994 (NSW).

Comments and submissions will be:

- made public unless you request confidentiality
- subject to the *Privacy Act 1988* (Cth).

Where can I find out more?

To find out more about the New South Wales Bar Association and our proposed professional standards scheme, please contact: Donna Boyce, Manager of Professional Standards and Membership on (02) 9232 4055.