

# New South Wales Bar achieves Professional Standards Scheme

By Justin Gleeson SC

As has already been announced to members, after much hard work, the Bar Association has secured the approval of the Professional Standards Council to the association establishing a scheme under the *Professional Standards Act 1994*. Gazettal of the scheme is anticipated shortly and members will be advised by the Bar Association when gazettal occurs, and when the scheme is to commence.

Credit is due to many who have worked to promote such a scheme over the past five years. The Bar Council originally approved the concept of seeking to advance a scheme in 2000 under the presidency of McColl SC. A committee originally chaired by Justin Gleeson SC first developed the concept. Brian Rayment QC's committee has brought it to fruition over the last several years. There has been a sustained contribution from Kim Kemp and Philip Selth of the Bar Association. Importantly, after representations which the Bar Council has made through the Law Council of Australia, amendments to associated legislation have been achieved to make the scheme more effective.

A full copy of the scheme is found on the Bar Association's web site at [www.nswbar.asn.au](http://www.nswbar.asn.au).

Some important practical aspects of the scheme for members should now be noted. First, to take advantage of the scheme, a barrister must:

- hold a New South Wales practising certificate;
- be a member of the Bar Association; and
- have approved professional indemnity insurance.

Second, by reason of limitations in the statute, the scheme cannot operate on a claims made basis. Accordingly, the scheme does not have retrospective effect. It will only limit a member's liability for acts which occur after the scheme comes into force. That will depend upon when the scheme is gazetted and tabled in parliament.

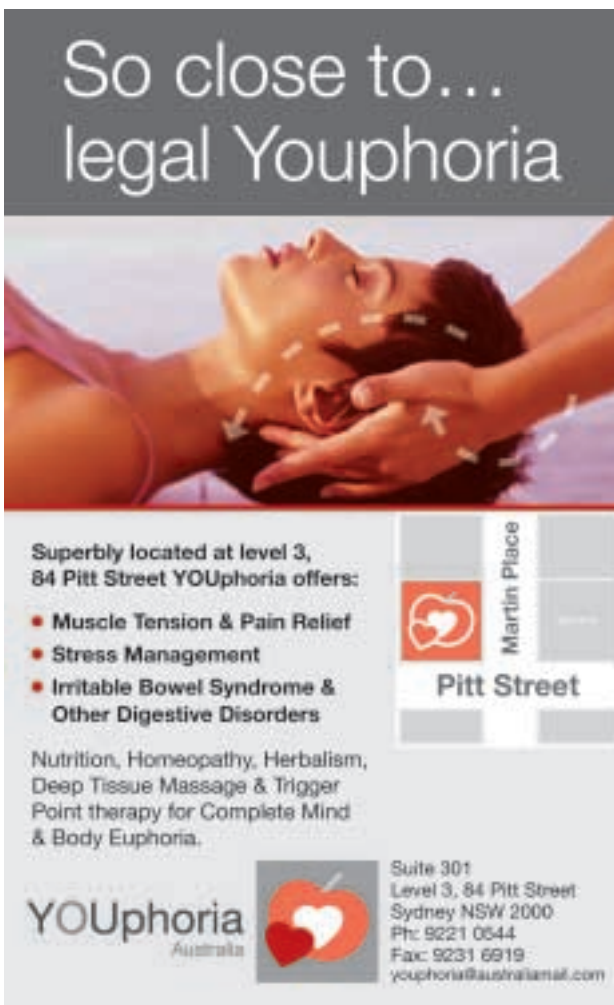
Third, it follows that there will still be a transitional period of several years where a claim might be made against a member arising out of an act or omission which occurred before the scheme came into force. The scheme will not limit liability in respect to such a claim. Thus, when members are considering what levels of insurance to renew in June 2005, and for some years thereafter, they may care to choose to retain levels of insurance higher than the minimum required by the scheme if they think that is necessary in respect to possible claims arising out of pre-scheme actions.

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**Any barristers who have chosen, or in the future choose, not to make the voluntary contribution necessary to be a member of the Bar Association, will not have the benefit of the scheme.**

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Fourth, the limit for civil liability under the scheme is \$1 million. However, this is \$1 million in respect to the principal liability of the barrister to the claimant. The insurance policy, if it is to provide cover for defence costs of the barrister, will need to provide defence costs cover in addition to the minimum of \$1 million cover for principal liability. The Bar Association earlier this year provided the four insurance policies approved by the attorney general to the Professional Standards Council. The association has also made the terms of the proposed scheme known to the four current insurers. The association believes that, despite some uncertainties in the wording of one policy (CGU), the better view is that all four approved policies currently in place comply with the scheme. This needs to be checked each year. Members, as always, still need to check their insurance policies as a whole to ensure they provide adequate cover for the specific needs of members. This includes members making a considered decision whether they wish to obtain cover above the \$1 million minimum amount required for principal liability. Members are urged to think carefully about this question when renewing policies in June 2005 and thereafter.



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Fifth, one of the important changes in associated legislation which has been achieved is that amendments have been made, effective 13 July 2004, to federal Acts being the *Trade Practices Act 1974*, *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001*. These are to the effect that state professional standards law cannot be by-passed by litigants attempting to access uncapped payments under these federal statutes. However, the amending legislation requires professional standards schemes to be prescribed. No schemes have as yet been prescribed for the purposes of the Commonwealth legislation, and until that action is taken, the Trade Practices Act and related provisions will continue to apply to persons covered by professional standards schemes including members of this Bar. As soon as the scheme commences in NSW, the Bar Association intends to ask for it to be prescribed under the Federal legislation and will advise members when prescribing occurs.

Sixth, in respect to personal injuries claims, traditionally these were excluded by the Professional Standards Act from the reach of a scheme. This is to be remedied by the *Professional Standards Amendment Bill 2004* (NSW) which was passed by parliament on 26 October 2004 and is awaiting assent. It should be noted that in the manner in which this amendment is drafted, the scheme will now protect barristers from negligence claims when they are conducting personal injury actions. The Act still excludes some matters from the scheme. Thus the scheme will not protect the barrister (or any other professional) in the case of breach of trust or fraud. Further, sec 5(1)(a) of the Act remains in place which provides that the scheme does not limit liability for death or bodily injury. However, sec 5(2) makes clear that sec 5(1)(a) does not apply where the barrister is acting for a client in a personal injury claim. Whether this leaves any other scope for sec 5(1)(a) is a matter barristers may care to consider. Barristers may also consider how their policies respond to liabilities for bodily injury.

Seventh, at present the scheme operates under the New South Wales Act and is given effect under the federal statutes referred to above. It does not yet have effect under the statutes of any other state. How, or to what extent, the scheme applies to work which has an interstate component may be a matter for debate. There would be questions of the constitutional reach of the New South Wales statute; its proper construction; and the interplay of federal law. The most that can presently be said is that there may be some limitations on the ability of the scheme to fully protect barristers where work has an interstate element.

For as long as the position for interstate work remains uncertain, it would seem reasonable for members, if they chose, to be able to insert into their fee agreements a contractual proviso that, wherever work is done, liability will be limited to that established under the *Professional Standards Act 1994* (NSW). As the *New South Wales Barristers' Rules* are

currently drafted, there is no express exception to the cab rank rule to allow this to occur. However, a wholesale review of the rules, including this issue, is currently being undertaken. The results of any amendments to the rules will be notified to members in due course in the ordinary fashion.

Eighth, it is an obligation under the Professional Standards Act that all documents given by the barrister to a client or prospective client that promote or advertise the person's occupation, must carry a statement to the effect that liability is limited under the Professional Standards Scheme. This is the sort of warning currently seen at the foot of many solicitors' letters. Barristers should ensure that a similar warning is placed on their letterhead and other promotional material, as soon as the scheme commences (but not until it commences).

In summary, the main matters which barristers need to attend to are as follows:

- maintain membership of the Bar Association as well as a practising certificate and approved insurance policy;
- ensure that each year insurance provides cover for at least \$1 million in principal liability with defence costs additional;
- when renewing insurance for at least the next few years, make a considered decision whether a higher limit is needed or desirable as protection against claims arising out of events before the scheme became effective; other possible exceptions to the scheme, i.e. some interstate work; and
- put the appropriate warning on the foot of all letterhead and other promotional material.

On 3 November 2004 Professional Standards Council material was distributed to all members covered by the scheme. The Bar Association also conducted CPD seminars explaining the scheme on 11 & 15 November 2004. Videos of those sessions are available in the Bar Library.

It should be noted that in order to obtain approval of the scheme, the Bar Association needed to persuade the Professional Standards Council that it had an appropriate risk management programme in place. The association's CPD programme is an important element of that risk management programme. The scheme itself has only been approved for five years and will be reviewed after that. Barristers are urged to continue to actively attend support and be involved in the CPD programme because it has this very important relationship with the limitation on liability obtained by the scheme.

Finally, it should be noted that the scheme is not free. The Bar Association needs to make an annual payment in New South Wales of \$35 per member, i.e. about \$70,000 in total. It is an important expenditure of the association's funds but one considered of significant and proper value to members.