Bankruptcy/Insolvency guidelines
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Revised at 14 June 2013
Introduction

This document sets out guidelines to be observed by the Society’s Council in exercising its discretionary powers pursuant to the Legal Profession Act 2007 (‘the Act’) in relation to insolvent practitioners. They are guidelines only. Regard must be had to the circumstances of each case.

Practitioners should be aware of their obligations upon becoming an insolvent under administration as set out in sections 67 and 68 of the Act.

Background

The Act gives the Council the power to exercise discretions, as follows, in relation to a practitioner who is an undischarged bankrupt, or has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit (hereinafter referred to as “insolvent practitioner”):

• Pursuant to section 63 of the Act, the Council may immediately amend or suspend a local practising certificate.

• Pursuant to section 69 of the Act, the Council may refuse to grant or renew a practising certificate or cancel, suspend or amend a practising certificate.

• Pursuant to section 498 of the Act the Council can appoint an external intervener to a law practice. Such intervention can comprise the appointment of a supervisor of trust money of a law practice or the appointment of a manager or a receiver for a law practice.
Policy

Insolvency is not usually the result of dishonest or improper behaviour or incompetence. One of the objectives of the insolvency laws is to assist the insolvent person to start afresh. The Council should exercise its discretions with that in mind, subject to its statutory obligations and its duties to ensure that the public is protected and confidence in the profession is maintained.

The same considerations are to be applied for all insolvent practitioners, irrespective of whether the practitioner is an undischarged bankrupt, or the subject of a debt agreement under Part IX of the Bankruptcy Act 1966, or a personal insolvency agreement under Part X of the Bankruptcy Act 1966.

The Council recognises that the insolvency of a practitioner should only, in exceptional circumstances, result in the Council stopping the practitioner from holding an employee practising certificate. Permitting an insolvent practitioner to hold an employee certificate may enable the practitioner to contribute, from his/her income earned as a practitioner, to his/her unpaid debts.

Insolvency caused by circumstances other than the conduct of a legal practice should not, absent other extenuating factors, prevent a practitioner from holding a principal’s certificate.

An insolvent practitioner is not to operate a trust account, or be approved as a signatory to a trust account unless:

1. in the case of a partner in a law practice, he/she gives an undertaking to only operate the trust account in conjunction with of his/her partners such that he/she cannot disburse money from the trust account unless the disbursement is also approved by one of the principals of the law practice or another authorised signatory to the trust account;

2. in the case of a sole practitioner:
   i. he/she gives an undertaking to only operate the trust account in conjunction with a person, or persons, approved by the Council such that he/she cannot disburse money from the trust account unless the disbursement is also approved by one of the persons approved by the Council; and
   ii. he/she gives an undertaking to provide copies of end of month reconciliations of the trust accounting records to the Society by the 21st day of the following month; and
   iii. the financial institution with which the trust account is maintained confirms that it will not allow the trust account’s operating instructions to be varied unless the Society has consented to such variation.

An insolvent practitioner should not be a trustee of any trust and is to be requested to give undertakings to the Society:

1. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) of his/her insolvency and, if possible, will take steps to have himself/herself immediately replaced as a trustee; and

2. not to accept any position of trust (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement.

An insolvent practitioner should not, unless he/she satisfies the Society to the contrary, be permitted to play an active role in the management of a law practice and, if not so permitted, is to be requested to give undertakings to the Society that he/she:

1. will not be a signatory to any of the law practice’s bank accounts;

2. will not participate in the financial management of the law practice; and

3. will confine his/her professional activities to solely providing legal services to clients.

The decision about an insolvent practitioner’s right to hold a certificate should be on the basis of the available evidence so that the Society can cancel, suspend, or amend the practising certificate if new information comes to light, or a problem is discovered or appreciated that was not known or fully understood before.

If an insolvent practitioner fails to comply with the requirements of section 68 of the Act and related provisions, the Society has a discretion to refuse to grant or renew a practising certificate or cancel, suspend or amend a practising certificate. Pursuant to section 69(3) of the Act, if such a discretion is exercised, the Society must give the affected person an Information Notice and the person has a right to make an application to the Queensland Civil and Administrative Tribunal for a review of the Society’s decision.

When considering whether to permit an insolvent practitioner to practise as a sole practitioner, the extent of the involvement of the insolvency trustee and whether this will in any way inhibit the independence of the law practice, should be taken into account. For example, if the insolvency trustee is likely to become involved in the management of the practice and privy to its clients’ business, this would be a very good reason for deciding against permitting the insolvent practitioner to practise as a sole practitioner.

The type of practice should also be considered. For example, the Council may be less inclined to permit a practitioner handling estates, or matters involving the retention of money in trust for extended periods of time, to practise as a sole practitioner.

An insolvent practitioner refused the right to hold a principal certificate but permitted to hold an employee certificate shouldn’t be permitted to continue to be employed in a practice of which he/she was the sole practitioner unless the name of the practice has been changed to exclude the name of the insolvent practitioner, or include the name of the purchaser of the practice. For example, if Fred Brown practised as Fred Brown & Associates and the practice was sold to John Smith, the name of the practice must be changed to exclude the name, Fred Brown, or to include the name, Smith. In addition, the practice letterhead must clearly record the name of the principal/s and the capacity in which the insolvent practitioner is employed or engaged.

If there is any morally reprehensible behaviour, or other improper conduct involved in the transactions leading to the insolvency, the Council must give consideration to cancelling, suspending, or amending the practitioner’s certificate.
Disqualification from managing a corporation

Pursuant to section 206B of the Corporations Act 2001, a person is disqualified from managing a corporation if the person is an undischarged bankrupt, or has executed a personal insolvency agreement under Part X of the Bankruptcy Act 1966 and the terms of the personal insolvency agreement have not been fully complied with. Accordingly, an insolvent practitioner can't be a director of an incorporated legal practice (ILP).

Disclosure requirements of section 269 of the Bankruptcy Act 1966

Pursuant to section 269 of the Bankruptcy Act 1966, an undischarged bankrupt, or debtor who is a party to a debt agreement under Part IX of the Bankruptcy Act 1966, who practises under an assumed name or a business name is required to disclose to every person, with whom he/she, or, if he/she is a partner in a law practice, the law practice, has any business dealings:

1. his/her true name; and
2. the fact that he/she is an undischarged bankrupt, or subject to a debt agreement,

Further, pursuant to section 269, an undischarged bankrupt, or debtor who is a party to a debt agreement under Part IX of the Bankruptcy Act 1966, can't, either alone, or jointly with another person, obtain credit to the extent of $3,000 or more from another person without informing that person that he/she is an undischarged bankrupt or a party to a debt agreement.

Procedure

Insolvency is a ‘show cause event’ for a practitioner. In Schedule 2 to the Act, ‘show cause event’ is defined, in relation to a person, to include:

1. his or her becoming bankrupt or being served with notice of a creditor’s petition presented to the Court under the Bankruptcy Act 1966 (Cwlth), section 43; or
2. his or her presentation, as a debtor, of a declaration to the Official Receiver under the Bankruptcy Act 1966 (Cwlth), section 54A, of his or her intention to present a debtor’s petition or his or her presentation, as a debtor, of a petition under section 55 of that Act; or
3. his or her applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with his or her creditors or making an assignment of his or her remuneration for their benefit.

An insolvent practitioner must comply with the requirements of sections 67 and 68 of the Act and provide to the Society the required notice within seven (7) days of the insolvency and a written statement within twenty-eight (28) days of the insolvency to enable the Society to make a decision in respect of the practitioner continuing to be a fit and proper person to hold a local practising certificate.

The Society is required to provide copies of the notice and statement to the Legal Services Commissioner.

The Society will make enquiries into the conduct of the practitioner leading to the insolvency and the reasons for the insolvency. The onus is on the practitioner to show why he/she should be allowed to practise as a principal or employee. The facts should be sworn by the practitioner (and not contained simply in correspondence written on his/her behalf).
Specific action as follows may be considered appropriate in the following scenarios:

**Partner in a law practice continuing as a partner**
A partner in a law practice may be permitted to remain as a partner if he/she can establish:

a. the clients’ interests will not suffer;

b. there is no fraudulent or unacceptable conduct;

c. the reasons for the bankruptcy do not involve legal practise;

and gives undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person with whom the law practice has any business dealings is notified of his/her name and that he/she is a partner in the law practice and is an undischarged bankrupt or subject to a debt agreement; and

iv. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person from whom the law practice obtains credit to the extent of $3,000 or more is notified of his/her name and that he/she is a partner in the law practice and is an undischarged bankrupt or subject to a debt agreement; and

v. not to personally use, or operate, or be a signatory, for a trust account; or alternatively

vi. to only operate on a trust account in a co-signatory capacity such that he/she cannot disburse money from a trust account unless the disbursement is also approved by one of the principals of the law practice or another authorised signatory to the trust account.

In addition, unless the practitioner satisfies the Society that he/she should be permitted to play an active role in the management of the law practice, the practitioner should be requested to give undertakings that he/she:

vii. will not be a signatory to any of the law practice’s bank accounts;

viii. will not participate in the financial management of the law practice; and

ix. will confine his/her professional activities to solely providing legal services to clients.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.

**Partner in a law practice becoming a sole practitioner**
A partner in a law practice who wishes to practise as a sole practitioner should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer;

b. there is no fraudulent or unacceptable conduct;

c. the reasons for the bankruptcy do not involve legal practise;

and his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, and conducts the law practice under an assumed name or a business name, to notify every person with whom his/her law practice has any business dealings, his/her name and that he/she is the sole principal of the practice and is an undischarged bankrupt or subject to a debt agreement; and

iv. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person from whom the law practice obtains credit to the extent of $3,000 or more is notified of his/her name and that he/she is the sole principal of the practice and is an undischarged bankrupt or subject to a debt agreement; and

v. to appoint to his/her trust accounts, a co-signatory, or co-signatories, approved by the Society, such that he/she cannot disburse money from a trust account unless the disbursement is also approved by one of the approved co-signatories and produces to the Society, a letter from each financial institution with which a trust account is maintained, that the financial institution will not vary the operating instructions for the trust account unless the Society has consented, in writing to the varied manner of operation; and

vi. to provide copies of end of month reconciliations of the trust accounting records to the Society by the 21st day of the following month.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.
Partner in a law practice becoming an employed solicitor

If as the result of the exercise of the discretion pursuant to Section 69, a practitioner is not permitted to hold a principal’s practising certificate, the practitioner may be permitted to practise as an employed solicitor and should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer; and
b. there is no fraudulent or unacceptable conduct; and
his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee;
ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and
iii. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, and conducts the law practice under an assumed name or a business name, to notify every person with whom his/her law practice has any business dealings, his/her name and that he/she is the sole principal of the practice and is an undischarged bankrupt or subject to a debt agreement; and
iv. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person from whom the law practice obtains credit to the extent of $3,000 or more is notified of his/her name and that he/she is the sole principal of the practice and is an undischarged bankrupt or subject to a debt agreement; and
v. to appoint to his trust account, a co-signatory, or co-signatories, approved by the Society, such that he/she cannot disburse money from his/her trust account unless the disbursement is also approved by one of the approved co-signatories and produces to the Society, a letter from each financial institution with which a trust account is maintained, that the financial institution will not vary the operating instructions for the trust account unless the Society has consented, in writing to the varied manner of operation;
vi. to provide copies of end of month reconciliations of the trust accounting records to the Society by the 21st day of the following month.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.

Sole practitioner continuing as a sole practitioner

A sole practitioner who wishes to remain a sole practitioner should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer;
b. there is no fraudulent or unacceptable conduct;
c. the reasons for the bankruptcy do not involve legal practise; and
his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and
ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and
iii. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, and conducts the law practice under an assumed name or a business name, to notify every person with whom his/her law practice has any business dealings, his/her name and that he/she is the sole principal of the practice and is an undischarged bankrupt or subject to a debt agreement; and
iv. to appoint to his trust account, a co-signatory, or co-signatories, approved by the Society, such that he/she cannot disburse money from his/her trust account unless the disbursement is also approved by one of the approved co-signatories and produces to the Society, a letter from each financial institution with which a trust account is maintained, that the financial institution will not vary the operating instructions for the trust account unless the Society has consented, in writing to the varied manner of operation;
vi. to provide copies of end of month reconciliations of the trust accounting records to the Society by the 21st day of the following month.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.
Sole practitioner becoming a partner in a law practice

A sole practitioner who wishes to become a partner in a law practice should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer;
b. there is no fraudulent or unacceptable conduct; and
c. the reasons for the bankruptcy do not involve legal practise; and

his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person with whom the law practice has any business dealings is notified of his/her name and that he/she is a partner in the law practice and is an undischarged bankrupt or subject to a debt agreement; and

iv. if he/she is an undischarged bankrupt, or a party to a debt agreement under Part IX of the Bankruptcy Act 1966, to ensure that every person from whom the law practice obtains credit to the extent of $3,000 or more is notified of his/her name and that he/she is a partner in the law practice and is an undischarged bankrupt or subject to a debt agreement; and

v. not to personally use, or operate, or be a signatory, for a trust account; or alternatively

vi. to only operate on a trust account in a co-signatory capacity such that he/she cannot disburse money from the trust account unless the disbursement is also approved by one of the principals of the law practice or another authorised signatory to the trust account.

In addition, unless the practitioner satisfies the Society that he/she should be permitted to play an active role in the management of the law practice, the practitioner should be requested to give undertakings that he/she:

vii. will not be a signatory to any of the law practice’s bank accounts;
viii. will not participate in the financial management of the law practice; and

ix. will confine his/her professional activities to solely providing legal services to clients.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.

Sole practitioner becoming an employed solicitor

If as the result of the exercise of the discretion pursuant to Section 69, a practitioner is not permitted to hold a Principal’s Practising Certificate, the practitioner may be permitted to practise as an employed solicitor if he/she can provide information that satisfies the Society that:

a. the clients’ interests will not suffer; and

b. there is no fraudulent or unacceptable conduct; and

his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. not to personally use, or operate, or be a signatory, for a trust account;

iv. not to be a signatory to any of the law practice’s bank accounts;
v. not to participate in the financial management of the law practice; and

vi. to confine his/her professional activities to solely providing legal services to clients;

provided that if the practitioner becomes an employee of the practice of which he was previously the principal, the name of the practice has been changed to exclude the insolvent practitioner’s name, or include the name of the purchaser of the practice and:

a. the practice letterhead clearly discloses the name/s of the principal/s of the practice; and

b. the practice letterhead clearly discloses the capacity in which he/she is employed or engaged.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.
Employed solicitor continuing as an employed solicitor

An employed solicitor who wishes to remain an employed solicitor should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer; and
b. there is no fraudulent or unacceptable conduct; and

his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. not to personally use, or operate, or be a signatory, on a Trust Account;

iv. not to be a signatory to any of the law practice’s bank accounts;

v. not to participate in the financial management of the law practice; and

vi. to confine his/her professional activities to solely providing legal services to clients.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.

Locum tenens

A practitioner who wishes to be a locum tenens should be asked to provide information that satisfies the Society that:

a. the clients’ interests will not suffer; and
b. there is no fraudulent or unacceptable conduct; and

his/her preparedness to give the following undertakings:

i. to forthwith notify all beneficiaries of any existing trust of which he/she is a trustee (created either by will or inter vivos) and if possible, take steps to have himself/herself immediately replaced as a trustee; and

ii. not to accept appointment as a trustee (created either by will or inter vivos) whilst he/she is an undischarged bankrupt or subject to a debt agreement or personal insolvency agreement; and

iii. not to personally use, or operate, or be a signatory, on a Trust Account or alternatively

iv. to only operate on a trust account in a co-signatory capacity such that he/she cannot disburse money from a trust account unless the disbursement is also approved by one of the principals of the law practice or another authorised signatory to the trust account.

The practitioner’s practising certificate is to be endorsed with a notation that the practitioner is required to comply with the undertakings given by him/her to the Society and is to specify the date, or dates, on which the undertakings were given.
Locum Solicitors List

Bankrupt/Insolvent solicitors are generally not to be included on the Society’s locum solicitors list.

Referral List

Bankrupt/Insolvent solicitors are not to be included on the Society’s referral list.

Membership of the Society

Rule 20(3) of the Legal Profession (Society) Rules 2007 (Society Rules) is in similar terms to section 68 of the Act. It requires an insolvent member to notify the Society of the insolvency [Rule 20(3)(a)] and provide a written explanation as to why the insolvent member considers that he/she is a fit and proper person to be a member of the Society [Rule 20(3)(b)].

Rule 20(6) of the Society Rules is in similar terms to section 69 of the Act. It provides for the Society to revoke a person’s membership of the Society.

The written notice given by an insolvent practitioner pursuant to section 68(1)(a) of the Act will be treated by the Society as written notice pursuant to Rule 20(3)(a) of the Society Rules.

Unless an insolvent practitioner advises that he/she wishes to give a separate written explanation as to why he/she remains a fit and proper person to be a member of the Society, the written explanation provided by the insolvent practitioner pursuant to section 68(1)(b) of the Act will be treated by the Society as the insolvent practitioner’s written explanation pursuant to Rule 20(3)(b) of the Society Rules.

Accredited Specialists

The Specialist Accreditation Candidate Handbook provides that a person must be a member of the Society to be eligible to be an accredited specialist.

Accordingly, a person will cease to be an accredited specialist if his/her membership of the Society is revoked.

Attachments

- Copies of sections 67, 68 and 69 of the Legal Profession Act 2007
- Copy of Rule 20 of the Legal Profession (Society) Rules 2007
- A copy of a blank “Notice by Practitioner of a “Show Cause” Event

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