

Insolvency Guidelines

commencing 1 July 2025

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* (LPA) 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 ss67 and 68 LPA. Though being served with a creditors petition is a show cause event these guidelines do not apply to it.

The LPA 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 s63 the Council may immediately amend or suspend a local practising certificate.
- Pursuant to s69 the Council may refuse to grant or renew a practising certificate or cancel, suspend or amend a practising certificate.
- Pursuant to s498 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.

The same considerations are to be applied for all insolvent practitioners, irrespective of whether the practitioner 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 (in the usual cases 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*).

In the following insolvency means the state of being an undischarged bankrupt, or having applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with creditors or made an assignment of remuneration for their benefit.

Guidelines

1. Insolvency can have many causes. It does not necessarily mean an insolvent practitioner should be excluded from earning a living as a solicitor. Insolvency is no bar to continuing to earn an income to provide for family and to pay to creditors. Property used by a Bankrupt to earn income does not vest in the Bankrupt's Trustee. A Bankruptcy Trustee may allow a sole insolvent practitioner to continue to trade.
2. Solicitors are trusted advisors to their clients, a fiduciary. Solicitors are required to meet exacting standards of conduct and propriety. Some of the common functions of a solicitor, to be a trustee, executor, administrator of an estate or an attorney sit incongruously with being an insolvent practitioner. Insolvency calls into question the suitability of a practitioner to be involved in a law practice trust account.
3. Insolvency does not necessarily say anything about the legal ability of a practitioner.
4. The Society issues, amends, suspends and cancels practising certificates (PC). A PC is a licence to practice law. If restricting that licence the Society acts upon an assessment of the practitioner's fitness to practice. It undertakes this role in the interests of the public. Any restriction on the licence to practice is invoked to protect the public, not to punish the practitioner.
5. The LPA specifies that insolvency is a show cause event. Upon its occurrence the insolvent practitioner must show the Society they remain a fit and proper person to continue to hold a practising certificate. The LPA holds insolvency as an event that so calls into question the fitness of a practitioner that they are required to justify it.
6. The question of the fitness of an insolvent practitioner and the action to be taken, if the insolvent practitioner is found unfit, can only be determined when all of the circumstances of the insolvency are examined. This process is set out at ss67 to 70 LPA.
7. If more immediate action is required by circumstances the Society may impose conditions or suspend practising certificates under s63 LPA.
8. Every show cause matter must be determined upon its own merits. There is no blanket rule that an insolvent practitioner may not continue to practice, that a principal PC cannot be held.
9. But prima facie an insolvent practitioner will not be entitled to hold an unrestricted PC.

10. In making a determination of fitness the following are relevant considerations:-
- a. whether the insolvent practitioner has properly complied with their show cause obligations by promptly and fully reporting the show cause event in accordance with the requirements of s.68 of the LPA;
 - b. whether the insolvent practitioner continues to meet the suitability matters to hold a practicing certificate;
 - c. whether there exists any allegations concerning the dishonesty of the insolvent practitioner arising out of the insolvency, including in particular whether the insolvent practitioner has misappropriated or inappropriately dealt with funds;
 - d. whether the insolvent practitioner has engaged in conduct which appears to be an attempt to defraud creditors;
 - e. whether the insolvency was caused by events largely beyond the control of the insolvent practitioner
 - f. whether prior to the insolvency the insolvent practitioner earned a high income which combined with insignificant realisable assets, extravagant living and a growth in accumulated liabilities.
 - g. whether the insolvency is caused by the conduct of a legal practice
 - h. whether the insolvent practitioner has breached any tax laws;
 - i. Whether the insolvent practitioner is in breach of the Society's Tax and Superannuation Policy
 - j. whether there are other principal solicitors within the insolvent practitioner's practice that are able to operate a trust account and/or supervise the insolvent practitioner;
 - k. whether a supervisor has or is able to be appointed to the insolvent practitioner's practice;
 - l. the insolvent practitioner's areas of practice and whether they are currently a trustee, executor, administrator of a deceased estate or hold power under a general or financial power of attorney
 - m. The insolvent practitioner's ongoing requirements to operate upon a trust account
 - n. In the case of a sole practitioner the involvement of a Bankruptcy Trustee
 - o. the state of the insolvent practitioner's law practice generally and their ability to continue to meet the needs of their clients (for example, whether the administrative responsibilities of the practitioner have been met, whether key time frames have been adhered to etc.);
 - p. Whether client's interests will be compromised by the insolvency; and
 - q. The insolvent practitioner's ability to continue to earn an income having regard to the interests of creditors and the obligations of the practitioner to make income contributions.
11. There is a special salience to meeting taxation and superannuation obligations when a solicitor. There is a duty to meet these civil obligations over and above that of a citizen by nature of the special position of an officer of the Court. Where there are such debts owing the insolvent practitioner should set out how and why they accumulated and the efforts made by the insolvent practitioner to repay them including negotiating with authorities for a payment plan. Where there are debts in the payment of staff superannuation the insolvent practitioner should set out the information given to staff about this.
12. Except in exceptional circumstances insolvent practitioners will likely have these conditions applied to their practising certificates:-
- not accept an appointment as a trustee of any trust;
 - immediately notify all beneficiaries of any existing trust of which I am a trustee or administrator (created either by will or inter vivos) of the fact of my bankruptcy and if possible, take steps to have myself immediately replaced as trustee or administrator.
 - not accept an appointment to act as an administrator of a deceased person's estate
 - not accept appointment, or continue to act as done under any power of attorney or other instrument in relation to financial or property matters;
 - not to engage in any activity from which a bankrupt is disqualified under any Commonwealth or Queensland law;
 - immediately, upon becoming aware of any failure to comply with the conditions applied to the certificate, notify the Society in writing of the circumstances and particulars of the breach, and immediately take such steps as are necessary to remedy the breach and prevent its continuation;

13. These conditions recognise that it is not in the interests of the public that solicitors who are insolvent occupy positions of responsibility for the financial affairs of others, which is a common aspect of solicitor's practice. They reflect the automatic effect of a bankruptcy upon Powers of Attorney. They recognise there is no legislative provision that a trustee must cease upon insolvency but require notification of the insolvency so that beneficiaries know of the position and can take action as they deem fit. They require the solicitor to observe all the disqualifications of a Bankruptcy. They also require that the solicitor hold themselves accountable for the performance of all conditions imposed on the certificate.
14. It is not desirable that insolvent practitioners be involved in the financial management of a law practice. In the ordinary course insolvent practitioners should expect the imposition of condition as follows:-
 - not be a signatory to any of the law practice's bank accounts;
 - not participate in the financial management of the law practice;
15. There may be circumstances that overcome the imposition of those conditions, these will in the main be where a remaining principal shows a need, for the ongoing operations of the practice, to remove them. This may be easier to show in the case of sole or small practices

The operation of a law practice trust account

1. In the absence of circumstances justifying otherwise insolvent practitioners can expect to be prevented from receiving and holding trust money or operating upon a law practice trust account. Solicitors are bound to meet exacting standards of conduct. The trust account is a sacred trust. Control of law practice trust money should not be held by an insolvent practitioner unless there are circumstances justifying otherwise.
2. Because trust accounts are operated by a law practice, a principal of which must be authorised by condition on their practising certificate to hold trust money (see s292) this means particular considerations for sole practitioners. An insolvent sole practitioner may establish that they should continue to so practice. This alone will not justify operating a trust account, there must be an illustrated need to practice with a trust account. If that is shown the right to do so will in almost all cases still be subject to restriction. It might be that a supervisor is required or an independent co signatory.
3. This means there will be decisions to be made upon notification of the insolvency pursuant to s63 LPA which allows the Society to immediately amend a PC.
4. Therefore upon the notification of a insolvency under s68(1)(a) of the Act the Society will, if the practitioner is a Principal at that time require the following information to allow it to determine if immediate action under s63 LPA is required:-
 - a. The name of their law practices
 - b. Details of the law practice trust accounts conducted by the law practices
 - c. Details of all persons authorised as signatories to those trust accounts
 - d. Is there another principal practising certificate holder available and willing to be a sole or co signatory to the account
5. From that information the Society will consider if immediate action is required upon the entitlement of the insolvent practitioner to deal with trust money. This may as a consequence involve the appointment of external interveners

Actions that may be taken upon the right to receive trust money under s63

1. A condition may be imposed to require an independent principal PC holder to be appointed as a co signatory of the trust account in order to preserve the insolvent practitioner's right to receive trust money. The authorisation under s292 may be removed. It might be that a supervisor is to be appointed.

Actions that may be taken upon the right to receive trust money upon a determination of fitness under s69

1. In the usual course, if the decision is not to cancel or suspend the insolvent practitioners PC:-
 - a. Where the insolvent practitioner will continue to hold an employee level pc, or upon insolvency a principal will downgrade to an employee PC they can expect in the absence of circumstances justifying otherwise this condition:
 - not personally use, or operate, or be a signatory to a law practice trust account;
 - b. Where the insolvent practitioner is a principal of a law firm or MDP and will continue as such they too can expect that condition to be applied to their practising certificate in the absence of circumstances justifying otherwise. It will usually be the case that there is another Principal in the law practice who can take responsibility for and operate the trust account. If there is not it will be for them to demonstrate why they should despite the insolvency be entitled to operate the trust account. In any case, exceptional circumstances or not it is likely that the insolvent practitioner will not be entitled to continue to operate a trust account without a co signatory holding a principal PC or under the supervision of external interveners appointed by the Society.

NB. A legal practitioner director of an LLP is disqualified from the directorship by reason of a bankruptcy or a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*. The Society will not appoint that person as an alternate to the director under s119(5) LPA to allow them to continue to operate the trust account. They can expect, in the absence of circumstances justifying otherwise to have conditions placed on their PC as set out in paragraph 22 (a) and (b) above. As they are disqualified by the bankruptcy from being a director of a corporation the Society will not allow them a Principal PC if they remain employed in an incorporated legal practice, they will be issued an employee PC.

- c. In the absence of circumstances to the contrary a sole insolvent practitioner will lose the entitlement to operate a law practice trust account. They will be required to close down any existing trust account and distribute the monies from it. This may be undertaken by external interveners appointed by the Society.
- d. A sole insolvent practitioner may satisfy the Society that the circumstances of the insolvency justify that they continue to hold a principal practising certificate. It is a further matter to show in that case they should continue to hold the right to receive trust money, to operate a law practice trust account. Any right to continue to receive trust money will be limited by the need to have on the trust account as a co signatory an independent Principal PC holder who has the right to receive trust money. In the absence of a nominated co signatory at the time of the Society's determination of fitness it is unlikely a right to receive trust money will remain. This may lead to the Society appointing external interveners to the practice.