

## Consultation on draft Financial Advice Code – initial comments from the Office of the Privacy Commissioner, November 2018

### **We support a Code obligation for financial advisers to protect client information**

We are pleased to see the draft Financial Advice Code provides an obligation for financial advisers to protect client information under Standard 6.

While financial advisers already have obligations under the Privacy Act 1993, we agree that treating individuals' information appropriately should also form part of their core ethical obligations. Standard 6 will draw financial advisers' attention to protecting client information and allow the regulator to consider information practices in relation to a person's fitness to provide financial advice.

We are aware of some stakeholder concerns that Standard 6 "duplicates" obligations in the Privacy Act. The Commissioner's view is that consistent principles in the Financial Advice Code and Privacy Act could usefully promote financial advisers protecting clients' information.

These obligations could reinforce each other, especially since the functions of the regulatory regimes are different but complementary. Our Office investigates potential interferences with an individual's rights and endeavours to settle disputes, while occupational regulation deals with a person's fitness to provide financial advice. We'd be very happy to work together on shared guidance, processes and communications.

### **Suggestions to clarify Standard 6 and promote consistency with the Privacy Act**

We have reviewed Standard 6 and its commentary with the Working Group's objectives in mind, including that drafting is clear, concise and flexible for a wide range of situations. We also recommend that wherever possible, the Standard 6 principles and wording align with the Privacy Act to minimise complexity and compliance costs for financial advisers.

We would like to discuss the following specific drafting recommendations and questions. We provide draft amendments over the page:

- a) The current wording confuses how advisers *use* information and how they *disclose* information. We recommend referring to "use and disclosure"
- b) It would be clearer to list the purposes for which a financial adviser should generally use or disclose clients' information. We do not think it is necessary to repeat every Privacy Act ground for use/disclosure but recommend Standard 6 allows some flexibility for other lawful reasons. We suggest including "required or permitted by law" in the commentary
- c) We are interested in why Standard 6 restricts information that will be used in an anonymised form. There are exceptions for anonymised information under principles 10(f) and 11(h) of the Privacy Act, and with the Working Group's March 2018 proposal that "any Code standard that addresses confidentiality would apply only where it relates to information that can be linked to an identifiable person".

## Possible amendments for discussion (see tracked changes)

### [Standard 6] Protect client information

A person who gives financial advice must take reasonable steps to protect client information against loss and unauthorised access, use, modification, or disclosure.

#### COMMENTARY

Client information includes all information about clients that is collected or held by a person who gives financial advice. That includes, but is not limited to, information in work papers and records, and the financial advice given to clients.

~~Unless disclosure is required by law or the client agrees otherwise, client information about a particular client may be used only for giving financial advice to the client or another purpose that is directly related to giving that financial advice. This applies even where the client information would be used for another purpose in an anonymised form.~~

Client information about a particular client should only be used or disclosed:

- for the purpose of giving financial advice to the client
- for another purpose that is directly related to giving that financial advice
- if the use or disclosure is required or permitted by law
- if the client has agreed to their information being used or disclosed for another reason.

Information can also be used if it will be used or disclosed in an anonymised form. (To discuss – we recommend this change to the draft unless there is a policy justification otherwise)

Physical and electronic security measures should be maintained so that only authorised personnel of the financial advice provider have access to client information.

Client information should only be held for as long as it is required for a lawful purpose, such as for the purposes of the engagement, or to comply with a regulatory requirement. When it is no longer needed ~~the~~ client information ~~then~~ should be returned to the relevant client or disposed of securely.

#### Relationship with the Privacy Act 1993

Agencies (including a person who gives financial advice) have expanded obligations to protect client information under the Privacy Act. Standard 6 is intended to broadly align with those obligations but is not a substitute for complying with the Privacy Act.

There are also other legal obligations relating to retaining, using and disclosing client information including. ~~Those obligations include privacy law (for example, the Privacy Act 1993) and~~ laws that require or enable disclosure of client information in certain circumstances (for example, under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009).