

## **Fidelity Life Assurance Company Limited Submission**

### **Consultation Paper – New Financial Advice Regime (Consultation Paper)**

#### **Draft Financial Services Legislation Amendment Bill (Bill) and proposed transitional arrangements**

Fidelity Life Assurance Company Limited (Fidelity Life) welcomes the opportunity to submit on the Bill and Consultation Paper.

The Financial Advisers Act 2008 (FAA) included a purpose to encourage public confidence in the professionalism and integrity of financial advisers. This purpose has been dropped from the Bill. This is a lost opportunity and we recommend that the concepts of the professionalism and integrity of financial advisers remain as one to the purposes of the new regime.

Fidelity Life supports a model where consumers' interests come first. We believe consumers should be readily able to obtain independent financial advice through competent financial advisers who are held to a high standard of ethical behaviour. While we support the Bill being technology neutral, the value of a relationship with someone whom you trust and who operates professionally, should be reflected in the draft legislation.

Fidelity Life also supports the proposal permitting financial advisers to be more responsive to consumers' needs, by being able to provide limited advice. But this must be balanced by an approach that recognises and supports the value of independent financial advice.

Independent financial advice has significant benefits for the financial health and well-being of New Zealanders. Financial advisers form long term relationships with clients, ensuring they have adequate insurance protection as their circumstances change over time, helping them at claims time and promoting and improving financial literacy.

Previous submissions have highlighted that New Zealand has a significant underinsurance problem. Insurance protects New Zealanders during difficult times. A thriving financial advice profession is essential to ensure that all consumers can access suitable insurance protection.

The changes proposed to the Financial Markets Conduct Act (FMC Act) will impact all market participants. The FMC Act is complex and detailed legislation. The full impact of the changes cannot be assessed until businesses have access to the final form of regulations and the new code of professional conduct for financial advice services (Code). For these reasons, there should be a proportionate and pragmatic approach to licencing which provides adequate time to enable businesses to adopt the changes.

## Part 1 of the Bill amends the definitions in the FMC Act

1. **If an offer is through a financial advice provider, should it be allowed to be made in the course of, or because of, an unsolicited meeting with a potential client? Why or why not?**

An offer of a financial advice product through a financial advice provider should be permitted in an unsolicited meeting. This exemption should only apply if the financial advice provider's licence authorises the distribution of that type of product.

2. **If the exception allowing financial advice providers to use unsolicited meetings to make offers is retained, should there be further restrictions placed upon it? If so, what should they be?**

We do not support further restrictions being placed upon unsolicited meetings. We support the continuation of the exception without further restrictions. Fidelity Life supports the provision of independent financial advice through competent financial advisers who adhere to the code. In addition, Fidelity Life offers all new retail customers a free look period to change their mind without any cost regardless of how they purchased a policy.

3. **Do you have any other feedback on the drafting of Part 1 of the Bill?**

- a. The changes proposed to Part 1 of the Bill include a definition of "**financial advice representative**". This definition may not work with the transitional licence proposals.

We understand that current market participants will be able to continue to provide class advice under a transitional licence. Under such a licence, employees who provide class advice would fall within the definition of "financial advice representative".

The Consultation states that "only previous QFE's may operate with representatives under a transitional licence" (page 47). Fidelity Life is not a QFE (although it is regulated as a licenced insurer). Further consideration must be given to enable non-QFEs to deliver class advice during the transition period.

- b. The definitions of "**financial adviser**" and "**financial advice representative**". Although financial advice representatives technically provide "advice", we are concerned that this is not what consumers understand as financial advice. The Bill enables limited advice, so that financial advice representatives may only sell the products of one product provider.

Further clarity should be provided about the service that a "**financial advice representative**" provides. It would be clearer to call "financial advice representatives" "financial provider representatives".

- c. The definition of "financial advice representative" includes any individual who is "engaged" by a financial advice provider. Further clarity on what is meant by engaged is required.

## Part 2 of the Bill sets out licensing requirements

### 4. Do you have any feedback on the drafting of Part 2 of the Bill?

#### Clause 15

The legislation focuses on regulating services, but product providers generally sell products not services. This means the regime may be a poor fit to the business of a product provider and so fail to meet the FMC Act additional purpose of avoiding “unnecessary compliance costs”.

## Part 3 of the Bill sets out additional regulation of financial advice

### 5. Do you agree that the duty to put the client’s interest first should apply both in giving the advice and doing anything in relation to the giving of advice? Does this make it clear that the duty does not only apply in the moment of giving advice?

Fidelity Life continues to support the requirement that customers’ interests come first. We believe that is what customers think financial advice is.<sup>1</sup> Financial advisers are professionals and part of that professionalism is putting a customer’s interests first.

Guidance in the Code would be useful as to the scope of the application of this duty. For example, when a customer has an insurance policy and a person recommends that the policy is replaced by another product, if the customer’s interest is put first, the customer should receive full advice comparing the terms of both insurance policies. Because of this, there may be circumstances where limited advice (s431G) is not appropriate for replacement business.

### 6. Do you have any comments on the proposed wording of the duty that a provider must not give a representative any kind of inappropriate payment or incentive? What impacts (both positive and negative) could this duty have?

A negative impact of this duty is that it implies that financial advisers can be remunerated by “inappropriate payment or other incentive”. This is damaging to the reputation of financial product providers, financial advisers and to New Zealand’s wider financial markets.

Greater clarity is required on what is an “inappropriate payment of other incentive”. The Bill should seek to enable financial providers to distribute their products responsibly. Regulation that is unclear has significant costs to the market.

### 7. Do you support extending the client-first duty to providers who do not provide a retail service (i.e. those who only advise wholesale clients)? Why or why not?

No feedback offered

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<sup>1</sup> See our submission on the Options Paper here - <http://www.mbie.govt.nz/info-services/business/business-law/financial-advisers/review-of-financial-advisers-act-2008/options-paper/options-paper-submissions/FidelityLife-Parts12.pdf>

## **8. Do you have any other feedback on the drafting in Part 3 of the Bill?**

### **Clause 24 – new s431A**

These two additional purposes were two of the three goals set out in the Issues Paper. The Issues Paper had a third goal which was “Public confidence in the professionalism of financial advisers is promoted” which in our view should be reinstated. This is a lost opportunity as independent financial advice has significant benefits for the financial health and well-being of New Zealanders.

### **Clause 24 – new s431B - “regulated financial advice”**

This terminology adds complexity. While we acknowledge that this may be to ensure that the terminology is consistent with the FMC Act, a driving force of this review has been to make the regime less complex.

The legislation should clarify that a financial adviser gives advice on their account, but a financial adviser representative passes on the financial advice of a financial advice provider.

### **Clause 24 – new s431C, 431D and s431N**

Further clarification should be provided on what it means to “**engage 1 or more individuals to give regulated financial advice on A’s behalf...**” Does this require a written engagement agreement to provide financial advice? Will referrals to another financial advice provider be captured? Is contracting with a financial advice provider to provide financial advice services when they distribute products caught by this provision?

It should be clear that a financial advice provider who engages another financial advice provider is not caught by this provision.

### **Clause 24 – new 431G**

Fidelity Life supports moves to allow consumers to more readily access advice. However, we are concerned a consumer may not recognise that they effectively received sales with no advice when they are sold one product with no comparison to other products or consideration of suitability. It is important that a consumer understands this. The regime must distinguish independent financial advisers from financial advice representatives.

Limited advice will be a particular concern for replacement business. When a policy is replaced, the customer should be given full advice so he or she can understand if the new product is better.

### **Clause 24 – new 431L**

Fidelity Life supports the intention to improve consumer understanding. The detail of disclosure is still to come in regulations, but what is included in the exposure draft is unclear. Making information available does not mean that a person understands it. Will there be multiple layers of disclosure?

It must be acknowledged that financial advisers play an important role in improving financial literacy. Consideration should be given to ways financial advisers can be supported in this role. Part of that is by ensuring the proposed regime supports the professionalism of financial advisers. However, there may also be practical steps that Government agencies can take to ensure that New Zealanders are encouraged to access financial advisers so that financial literacy is improved.

## Part 4 of the Bill sets out brokers' disclosure and conduct obligations

### 9. What would be the implications of removing the offering concept from the definition of a broker?

No feedback offered.

### 10. Do you have any other feedback on the drafting of Part 4 of the Bill, for example any suggestions on how the drafting of broker provisions could be simplified or clarified?

No feedback offered

## Part 5 of the Bill makes miscellaneous amendments to the FMC Act

### 11. Should financial advisers have direct civil liability for breaches of their obligations, if the financial advice provider has met its obligations to support its advisers? Why or why not?

The Bill proposes to change the current liability regime to one which significantly increases the penalties and the ease with which enforcement action can be taken. All market participants will be exposed to increased risk, but the cost of that risk will fall disproportionately on small or sole trader licensed financial advice providers. This in turn could be a barrier to transition and or entry for small or sole trader licensed financial advice providers.

### 12. Should the regime allow financial advice providers to run a defence that they met their obligations to have in place processes, and provide resources to enable their advisers to comply with their duties?

Yes, provided a consumer has access to recourse and redress. Such a defence would recognise that although financial advice providers can support the advice-giving process, the financial adviser is going to remain of primary importance to the consumer.

### 13. Is the designation power for what constitutes financial advice appropriate? Are there any additional/different procedural requirements you would suggest for the exercise of this power?

This gives significant power to the regulator. Currently a market participant who does not agree with the decision made by the FMA must seek judicial review of that decision. This is a slow, expensive process that would damage the relationship between the market participant and the regulator.

In Australia, decisions of ASIC can be independently reviewed by the Administrative Appeals Tribunal. It is important that New Zealand market participants can easily access a right of appeal, which provides for a timely response. This will help ensure confidence in the regulatory system.

### 14. Do you have any feedback on applying the concept of a 'retail service' to financial advice services? Is it workable in practice?

No feedback offered

**15. Do you have any other feedback on the drafting of Part 5 of the Bill?**

Consideration should be applied to ways in which records can be kept about individual financial advice representatives. We understand that the inability to track representatives involved in mis-selling has been an issue in Australia.

**Part 6 of the Bill amends the FSP Act**

**16. Does the proposed territorial application of the Act set out above help address this use of the FSPR? How soon after the passing of the Bill should the new territorial application take effect?**

The proposals should take effect as soon as possible after the passing of the Bill.

**17. Do you support requiring further information (such as a provider's AML/ CFT supervisor) to be contained on the FSPR to help address misuse?**

In principle Fidelity Life supports more information being included on the FSPR to provide consumers with useful information. We are unclear how information about New Zealand's AML/CFT regime would assist those consumers.

**18. Do you consider other measures are required to promote access to redress against registered providers?**

No feedback offered.

**19. Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?**

The current mismatch between legal obligations and the content of the register itself is confusing. The proposals set out in the Consultation Paper appear sensible.

**20. Do you support clarifying schemes must provide information to the FMA if they believe that a provider may be involved in conduct that constitutes a breach of relevant financial markets legislation?**

Scheme reporting obligations should be focussed on material or systemic issues.

**21. Do you have any other feedback on the drafting of Part 6 of the Bill?**

The Consultation Paper states that individual adviser registrations will be linked to a financial advice provider. Sole trader financial advisers will be subject to increased compliance costs and exposure. It is important that the requirements for sole traders are proportionate to their business models.

**22. When should an FMC Act DIMS licence granted to AFAs who provide personalised DIMS expire? For example, should it expire on the date on which the AFA's current authorisation to provide DIMS expires?**

No feedback offered.

**23. Do you have any other feedback on the drafting of Schedule 1 of the Bill?**

No feedback offered.

**Schedule 2 of the Bill creates a new schedule to the FMC Act with detail about the regulation of financial advice**

**24. Should the FMC Act definition of ‘wholesale’ be adopted as the definition of wholesale client for the purposes of financial advice? Why or why not?**

No feedback offered.

**25. We understand that some lenders consider that they may be subject to the financial adviser regime because their interactions with customers during execution-only transactions could be seen to include financial advice. Does the proposed clarification in relation to execution-only services help to address this issue?**

No feedback offered.

**26. Are there any unintended consequences resulting from the minor amendments to the exclusions from regulated financial advice, as detailed above?**

No feedback offered.

**27. Do any of the membership criteria or proceedings for the code committee require further clarification? If so, what?**

The Code committee should be representative of the industry and the diversity of New Zealand consumers.

**28. Does the drafting of the impact analysis requirement provide enough direction to the code committee without being overly prescriptive?**

Yes.

**29. Does the wording of the required minimum standards of competence knowledge and skill which ‘apply in respect of different types of advice, financial advice products or other circumstances’ adequately capture the circumstances in which additional and different standards may be required?**

Yes.

**30. Should the Financial Advisers Disciplinary Committee consider complaints against financial advice providers as well as complaints against financial advisers? Why or why not?**

The Financial Advisers Disciplinary Committee should not consider complaints against financial advice providers. This committee exists to support and maintain the professionalism of financial advisers.

**31. If the jurisdiction of the Financial Advisers Disciplinary Committee is extended to cover financial advice providers, what should be the maximum fine it can impose on financial advice providers?**

See answer to question 30 above.

**32. Do you have any other feedback on the drafting of Schedule 2 of the Bill?**

No feedback offered.

**About transitional arrangements**

**33. Are there any other objectives we should be seeking to achieve in the design of transitional arrangements?**

We have identified the following:

- a) The design of transitional arrangements should allow changes to the business of a financial advice provider during the transition period.
- b) The scope of a financial advice provider licence is not currently clear. It should be possible for a provider to apply for a licence to only cover a part of its business.
- c) The position during transition for a non-QFE firm that currently provides class advice is not clear from the Consultation Paper. Page 47 of the Consultation Paper states that 'only previous QFE's may operate with representatives under a transitional licence'. A firm who currently provides class advice must be able to operate during the transition period. There should be an objective to allow the provision of class advice during the transition.

**Proposed transitional arrangements**

**34. Do you support the idea of a staged transition? Why or why not?**

A staged transition appears sensible in principle, although further consideration should be applied to enable current market participants to:

- develop their business during the transition period;
- apply for a limited licence; and
- provide class advice.

**35. Is six months from the approval of the Code of Conduct sufficient time to enable existing industry participants to shift to a transitional licence?**

It depends on the details of what will be required to transition. Please provide as much information about the licensing process as soon as possible to enable industry participants to provide a full answer to this question.

**36. Do you perceive any issues or risks with the safe harbour proposal?**

Many financial advisers have significant skill, ability and experience but may not hold any formal qualifications. There is a risk that financial advisers will leave the profession if there is not sufficient flexibility in the new Code. This would have a detrimental effect on the accessibility of quality advice for New Zealanders.



**37. Do you think there are any elements of the new regime that should or shouldn't take effect with transitional licences? What are these and why?**

Further consideration needs to be given to enabling businesses to change during the transition period. This may involve allowing providers to apply for a licence which only covers part of their business.

**38. Is two and a half years from approval of the Code of Conduct sufficient time to enable industry participants to become fully licensed and to meet any new competency standards?**

Yes, based on the information that is available.

It is critical to find ways to support and transition current RFAs to ensure that New Zealanders do not lose access to independent, quality financial advice and it does not become harder for consumers to access the advice and assistance they need through their lives.

It would be helpful if more information could be provided about the transition and licencing process as soon as possible. We are concerned about the negative impact uncertainty has on current providers of financial advice.

Section 403 of the FMC Act allows the FMA to impose conditions on a licence. Consideration must be given to whether the FMA requires further flexibility in the types of conditions it can impose. Licence conditions should enable the FMA to issue full licences, while giving financial advice providers sufficient time to bring their systems and documentation up to speed to meet the new requirements.

### **Possible complementary options**

**39. Do you support the option of AFAs being exempt from complying with the competence, knowledge and skill standards for a limited period? Why or why not?**

Certainly, this is one of the options that should be available to enable financial advisers to continue to be able to service their clients.

**40. Would it be appropriate for the exemption to expire after five years? If not, what timeframe do you suggest and why?**

Rather than placing a longstop time limit, it may be more appropriate to find ways to transition advisers to the new regime permanently.

**41. Is there a risk that this exemption could create confusion amongst industry and for consumers about what standards of competence, knowledge and skill are required?**

No. This is a principled based regime, with different licencing standards applying to different organisations. There is no reason why it cannot be flexible enough to enable experienced advisers who provide quality advice to remain in the industry.

**42. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?**

More flexibility would be achieved by dealing with this within the framework of the Code.

**43. Do you support the option of a competency assessment process for existing AFAs and RFAs? Why or why not?**

We support the option of a competency assessment process for existing AFAs and RFAs. In addition to being necessary to ensure that New Zealanders can access independent financial advice, many of these advisers have long, strong relationships with their clients and are relied upon by their clients for support at claim time. Everything possible must be done to enable independent, quality advisers to stay in the industry.

**44. Is it appropriate for the competency assessment process to be limited to existing AFAs and RFAs with 10 or more years' experience? If not, what do you suggest?**

A figure of 10 years appears arbitrary. The number of years of experience should be considered as part of the assessment process, and not used to limit those who can apply under this process.

**45. If you support this option do you think it should be set in legislation or something for the Code Working Group to consider as an option as it prepares the Code of Conduct?**

If this is to remain as an option it should be dealt with by the Code Working Group and not dealt with in legislation.

### **Phased approach to licensing**

**46. What would be the costs and benefits of a phased approach to licensing?**

The benefit of a phased approach to licensing is that it would allow the market and regulator to better manage the licensing process. The disadvantage and inequity in this approach is that licensing is generally more work for those who apply first. Other market participants can benefit from the experience of the first-movers.

**47. Do you have any suggestions for alternative options to incentivise market participants to get their full licences early in the transitional period?**

We would suggest consideration be given to a scale of fees for licencing applications, with lower fees at the start of the transition period.

**48. Do you have any other comments or suggestions regarding the proposed transitional arrangements?**

See answer to questions 46 and 47.

## Demographics

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51. **Are you providing this submission:**

- As an individual  
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