



#### **Banking Ombudsman Scheme**

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### **Submission on Code of Professional Conduct for Financial Advice Services consultation paper**

Thank you for the opportunity to contribute to the development of a Code of Professional Conduct for Financial Advice Services (the code).

This submission is based on the Banking Ombudsman Scheme's experience in considering complaints about financial advice services. We note the request for feedback on the key concepts and high-level approach under consideration by the working group. We will make another submission once the draft code is published for consultation.

#### **Preliminary comments**

Codes of practice provide an important accountability mechanism and play a crucial role in regulating professional services, and strengthening consumer confidence. This Code will express the intent of the new financial advice regime in practice, and formalise the community's expectations of fair and consistent treatment throughout the life cycle of a financial product or service.

When conducting investigations and making determinations, BOS takes the law, relevant judicial authority, good banking practice, and any relevant codes of practice into account. This Code will be a relevant standard that BOS will apply when it is considering complaints. It will provide us with a key benchmark against which participants' conduct will be measured.

#### **Overview**

We generally support the principles discussed in the consultation document as a means of promoting the competent and ethical provision of financial advice services. We support

a flexible and scalable approach that protects consumers and encourages providers to provide early, relevant, clear and concise information.

We believe the code should be clear in its objectives, its scope and the standards it is setting. By expressing those standards clearly, in high-level principles and in plain English, the code will be more accessible to, and enforceable by, consumers.

We are aware some concerns have been expressed about the cost of complying with the new regime's broader scope (as well as how to demonstrate compliance with the regime). We encourage the working group to focus the code on the consumer-centric principles of quality, accessibility and enforceability.

We support an approach that builds on the current regulation of the industry, including the New Zealand Bankers' Association's Code of Banking Practice. The working group may find it helpful to consider other professional services codes that have served New Zealand consumers and their sectors well. The Code of Health and Disability Services Consumers' Rights is one such example. It has been in place since 1996 without significant amendment and is based on scalable principles that apply to individuals and organisations, both registered and unregistered.

The comments below relate to areas where we have relevant insights or experience. We have followed the paragraph numbering from the consultation paper for ease of reference. We are happy for this submission to be summarised or made available publicly.

### **Specific comments**

*A. What comments do you have regarding the overarching theme of "good advice outcomes" and the underlying principles?*

We agree with the proposal to include an all-encompassing duty linked to good client outcomes in the code. Such a duty would provide the basis for interpreting and applying all of the code's other professional standards. It would also be consistent with the new regime's essential purpose – to ensure advice is of a high quality – and would place the client in his or her proper place, at the heart of all professional standards.

We also consider consistency to be a key principle of the code. A consumer should be entitled to expect a consistent service from the industry, no matter how big or small the provider and no matter what the format of the advice (whether in person or digital).

*B. Are there any further principles that should be included, or existing principles that should be removed?*

We agree with principles 1, 3 and 5 but have reservations about principles 2 and 4.

We do not agree with principle 2's assumption that most retail clients have basic knowledge, but not the provider's expert understanding. This point goes to the heart of a

fundamental principle of any code of professional conduct – accessibility. Every consumer, regardless of knowledge or expertise, should receive services in a manner that is consistent with his or her needs, and communicated in a way that he or she can understand.

Most complaints to our scheme are about miscommunication. Either the provider failed to gather enough information about the consumer, or the consumer failed to fully understand the terms and/or risks and benefits of the financial product or service.

The code should make no assumptions about a client's level of knowledge. Consumers' understanding of financial advice will vary widely. A provider should establish a client's level of knowledge as part of assessing his or her needs and providing the corresponding level of information. This will need to be done on a case-by-case basis. We are concerned that vulnerable consumers in particular would not be well served by a code containing such an assumption.

The code should require effective communication in a form, language and manner that enables the consumer to understand the information provided. This should be a scalable concept. A provider may, for example, be able to establish the information needs of existing customers relatively quickly, but would need to set aside more time for new customers or inexperienced customers who are unclear about their objectives. The duty to communicate effectively will also need to recognise that we live in a multicultural society, and providers may need to offer an interpreter where necessary and reasonably practicable.

For principle 4, we do not believe compliance costs should be a dominant factor in the working group's considerations. The code will represent minimum professional standards – which providers ought to be currently meeting – so it is difficult to see how the new regime will significantly increase costs.

Finally, we consider the code should contain another principle – enforceability. The success of any code in protecting consumers depends on the inclusion of appropriate remedies and sanctions for providers who fail to comply with the code.

### *C. Ethical behaviour*

We agree with all of the ethical standards outlined in the consultation document, but consider the following also deserve inclusion:

- Treat your client with respect
- Provide services that are consistent with your client's needs
- Provide services that are free from coercion, harassment or exploitation
- Provide services that take into account your client's cultural needs.

We agree with the recommendation of the report by the International Organisation of Securities Commissions that keeping your word, regardless of any legal obligation to do so, is a crucial element of ethical behaviour. Competent practice and effective

communication require a provider to gather sufficient information to be able to provide services that are consistent with a consumer's needs. The consumer's expectations should be reasonably managed as part of that process, and providers should not agree to commitments they cannot keep.

We do not agree with the suggestion in paragraph 88 of the consultation paper that there may be situations where a "reasonable client" ought to know that a commitment made by a nominated representative was wrong. The code should not shift the focus on to the reasonableness of the consumer. All providers, whether organisational or individuals, should have processes in place to ensure they gather the right information to assess a consumer's needs, share the information required for the consumer to make an informed decision about services and keep commitments they have made.

We consider this ethical obligation should be in the code as a statement of minimum practice, not left to a provider's own code of ethics.

Contrary to paragraph 95 in the consultation document, we consider there is merit in including a specific ethical standard requiring the provider to do no harm, or to at least provide services in a way that minimises potential harm to a client. We consider this standard reinforces the consumer-centric intent of the code and acts as a benchmark against which all providers can assess their advice.

We consider the alternative outlined in the consultation document (do nothing that would bring the profession into disrepute) does not achieve the same focus on specific customer outcomes.

#### *Ethical processes for provider entities*

We agree that the code should contain a general statement requiring providers to document and maintain their ethical processes. Providers would have to be able to demonstrate how they induct and train their staff in ethics, how ethical complaints or problems are resolved and how providers meet their ethical obligations as part of regular audit systems. Similar systems should be in place to ensure providers are monitoring the competence levels of staff and providing updates on any changes to legal or ethical obligations.

For organisations, this is a way to show they have taken all reasonable steps to ensure their employees and agents provide services with due care and skill. It should also be clear when providers will report any misconduct to appropriate authorities.

The code should set these expectations in broad terms. There is no need to go into great detail about compliance. Compliance details should be outlined in industry guidelines to avoid making the code overly technical and inaccessible to consumers.

We support the suggestion that providers can implement their own code of ethics. Providers would be able to outline their commitment to best practice in their own code. This can be a factor for consumers when choosing between providers. Providers' codes should also outline how consumers can complain about services and the options available to them to take their concerns to an independent dispute resolution service if not resolved by the provider (as part of the enforceability principle we have outlined above). Providers' codes should complement the code as the minimum standard.

#### *AA Conduct and client care*

We agree that the current client care standards in the Code of Professional Conduct for Authorised Financial Advisers should be transferred to the new code. We do not consider they require amendment to meet the wider advice contexts, such as class advice. Providers should use only systems that enable them to establish a client's level of understanding and needs before providing any type of financial advice. This requirement could be met in the class advice or robo-advice contexts by asking key filtering questions that help the provider to highlight consumers who may be better suited to one-on-one advice.

We support an approach that allows some guidance to be scalable, so that what constitutes compliance with client care principles can vary according to circumstances and type of agreement, in particular:

- what constitutes "reasonable" inquiries about the suitability of the advice
- what is required to help consumers make an informed decision
- what amounts to behaving professionally.

We support a code that takes a flexible rather than prescriptive approach. Such a code should set a clear benchmark for the industry and help providers to act reasonably and to exercise due care, diligence, and skill. It should also provide guidance for dispute resolution schemes in assessing complaints about financial advice, thereby enabling consistent decision-making. A prescriptive approach risks failing to include all applicable circumstances and therefore failing to adequately protect consumers' interests. A principles-based approach would offer the flexibility necessary for dispute resolution schemes to make decisions according to individual cases and circumstances.

#### *Assisting informed decisions*

Customers will have preferences about how they access financial advice services, but regardless of preference, providers must ensure adequate disclosure to customers. Face-to-face meetings and phone calls are an easy way to clear up any confusion about a service, but even online applications do not preclude opportunities to communicate. However the service is offered, the application process should not simply involve customers ticking (or clicking) one box to indicate they have read the terms and conditions of the agreement.

In our experience, customers rarely read the terms and conditions in full, especially since they are generally long and contain technical and hard-to-understand language. The code should therefore include some guidance about how to help customers understand the services on offer.

*Personalised suitability*

In our experience, clear disclosure is vital at the outset, particularly simple, concise explanations in plain English that include information about the risks and drawbacks of services. It is also vital to establish that customers understand the information they have been given. We do not agree with the proposal in paragraph 140 of the consultation document that there may be situations when the code standards do not apply. We consider all of the standards should always apply, with the interpretation of a standard scaled to the circumstances.

*General competence, knowledge and skill*

We support the proposals in paragraphs 154-156 of the consultation document about ensuring competence, knowledge and skill. We do suggest, however, that providers put in place reasonable quality assurance and supervision systems when a less experienced advisor is giving advice.

*ZZ Other matters – enforcement*

We consider every provider should have an appropriate complaints system in place. The code should highlight the essential elements of effective complaint-handling regarding financial advice services. It should also include guidance for consumers on how to bring a complaint about an alleged breach of the code.

Please do not hesitate to contact us if you would like more information or clarification regarding our submission.

Yours sincerely

**S 9 (2) (a)**

  
Banking Ombudsman