



20 July 2010

Code Committee  
c/- Securities Commission  
PO Box 1179  
Wellington 6011

By email: [consultation@financialadvisercode.govt.nz](mailto:consultation@financialadvisercode.govt.nz)  
[simone.robbers@seccom.govt.nz](mailto:simone.robbers@seccom.govt.nz)

### **Draft Code of Professional Conduct for Authorised Financial Advisers**

The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the revised draft Code dated 2 July 2010.

The Law Society comments as follows:

#### **1. Introduction**

1.1 The introduction describes each Code Standard as “an overarching principle”.

Section 86(1) of the Financial Advisers Act 2008 states that the Code “must provide for minimum standards of professional conduct”. It is submitted that a Code which seeks to embody “overarching principles” may not comply with the requirements of s86(1), namely to set out minimum standards of professional conduct.

1.2 This concern is reinforced by the numerous limitations imposed on the Code Standards by the subsequent provisions specifying an “overarching principle” and then paring it back with subsequent provisions can hardly be said to be setting out minimum standards of professional conduct.

1.3 It is suggested that it would be preferable for the first paragraph of the Introduction to read:

*The Code sets out Code Standards. Each Code Standard is followed by additional provisions. These comprise part of the Code and relate to the application of the Code Standards.*

1.4 For the above reasons, it is also suggested that the last two sentences in the penultimate paragraph on page 1 (Background) be omitted.

1.5 The first sentence in the second paragraph of the Introduction states:

*Unless otherwise stated, the additional provisions do not limit the application of the overarching principle under which they are stated.*

In fact the subsequent provisions frequently do limit the Code Standards. This is the position with each of Code Standards 1 to 5. It is submitted that it would be preferable to omit this sentence which is in any event unnecessary.

## **2. Code Standard 1**

- 2.1 The Law Society repeats the comments relating to this Code Standard contained in its submissions of 12 May 2010.
- 2.2 Placing the interests of the client first is a colloquial and imprecise expression. Further, there will be occasions where an AFA is required by law not to treat a client's interests as paramount. Examples of these include:
- The legal obligations of an AFA falling within the definition of a "financial institution" under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.
  - The duty of a lawyer who is an AFA to the Court which overrides the lawyer's duty to the client.
  - Disclosure required by the Inland Revenue Department under taxation legislation.
- 2.3 The Law Society submits that a preferable wording of this Code Standard would be along the following lines:

*An Authorised Financial Adviser must provide financial adviser services within the bounds of the law and the professional obligations of the AFA solely for the benefit of the client.*

## **3. Code Standard 2**

- 3.1 It is suggested that this Code Standard would be improved by linking it more closely to the purpose of the Act as set out in s3(1) and would therefore be more suitably expressed along the following lines:

*An Authorised Financial Adviser must not do or omit to do anything that would undermine public confidence in the professionalism and integrity of financial advisers.*

## **4. Code Standard 3**

- 4.1 It is noted that the reasonable person referred to in this Code Standard is limited to someone in the position of a client. This inevitably introduces an element of subjectivity as the matter must be viewed from a client's perspective. The Law Society suggests that a greater degree of objectivity is desirable and this could be achieved by omitting the words "in the position of a client".

## **5. Code Standard 4**

- 5.1 On the basis that the reference to "valuable property" in the final paragraph of the additional provisions is intended to extend the ambit of the Code Standard, would it not be preferable to include this in the Code Standard?
- 5.2 The Law Society suggests it would be desirable to consider whether this Code Standard should be extended to encompass any business transaction (beyond those associated with the giving

and receiving of financial advice) which may take place between an AFA and his or her client. There does not seem to be any particular reason why the prohibition should be limited to the borrowing or lending of money.

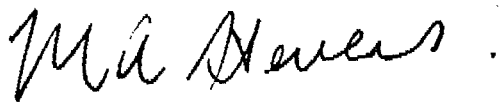
- 5.3 The *Lawyers Conduct and Client Care Rules* substantially restrict a lawyer from entering into any financial business or property transaction or relationship with a client. This may not occur unless:
- (a) the interests of the lawyer and the client correspond in all respects; and
  - (b) there is no possibility of the relationship of confidence and trust between lawyer and client being compromised; and
  - (c) the client is advised of the right to receive independent advice.
- 6. Code Standard 7**
- 6.1 It is suggested that item (h) of the additional provisions be expanded to refer to the client's right to complain to the Commission (s96(1) Financial Advisers Act).
- 7. Code Standard 8**
- 7.1 In relation to the first paragraph of the additional provision, it is suggested that in the third line the obligation to make reasonable enquiries should be limited to enquiry of the client. This would then be consistent with the primary duty to determine suitability based on information **provided by the client**.
- 8. Code Standard 10**
- 8.1 The Law Society considers that the definition of "complaint" as "an expression of dissatisfaction about an AFA's financial services" is an improvement on the wider definition contained in the original draft Code.
- 8.2 However, the Law Society considers that a definition of complaint is unnecessary as the expression has a sufficiently understood meaning. This is the approach taken in most complaints regimes in this country.
- 8.3 Further, and importantly, the Financial Advisers Act does not define complaint, but nevertheless has extensive complaints and disciplinary provisions. This raises the possibility that the meaning of complaint under the Act could well differ from that assigned to it in the Code, which would clearly be undesirable.
- 8.4 If a definition of "complaint" is to be retained, then in the Law Society's view the current definition is too broad and also insufficiently precise. In many instances, it is likely to be far from clear whether or not a mild expression of concern or dissatisfaction by a client can be said to amount to a complaint which would then trigger the complaints process. This is particularly so if the complaint is not required to be in writing.
- 8.5 It is not clear whether the right to complain is intended to extend to dissatisfaction with a fee rendered by an AFA. It is suggested that it would be desirable for this to be clarified in an additional provision.

8.6 As indicated in the Law Society's initial submissions, it is considered that a complaint should be in writing. This is standard practice in most complaints regimes. Having a complaint clearly expressed in writing can assist materially in the processing of the complaint and generally is in the interests of all concerned.

**9. General**

9.1 There are a number of minor or typographical items in the draft Code, which need to be corrected. We enclose some pages from the draft Code with suggested amendments shown.

Yours sincerely

A handwritten signature in black ink that reads "Anne Stevens". The signature is written in a cursive, flowing style.

Anne Stevens  
**Vice President**