

New Zealand Law Society

Oral Submissions to the Parliamentary Select Committee Meeting on the Financial Service Providers (Pre-Implementation Adjustments) Bill and the amendments proposed in the Supplementary Order Paper No 113

Our central submission is that lawyers should be exempted from the Financial Advisers Act in respect of financial advice which is an incident of legal practice.

Lawyers are frequently asked by clients to give some form of financial advice in connection with the legal work they are carrying out. Typical examples are:

- A client wanting to decide whether to rent or buy a commercial building for their business.
- A client wondering whether to take a lease of a commercial building in a central city area or on the outskirts of the city.
- A client wondering whether to rent or buy a home.

Currently the lawyer exemption applies to advice of this kind only if it is a **necessary** incident of legal practice.

Our difficulty is we do not know what shade of meaning will be given to the word 'necessary'. At its worst, 'necessary' could be interpreted very narrowly with the advice needing to be an essential and indispensable part of the legal advice. The examples I just referred to are clearly incidents of legal advice (and hence of legal practice). But would giving this be universally held to be an essential or indispensable part of legal practice? The answer is far from clear and there will be many different views.

Clients expect their lawyers to assess all the pros and cons of a transaction having regard to the client's individual circumstances and not just to advise on the black letter law.

It would be detrimental to the public interest if lawyers felt constrained to limit their advice because of a concern that the advice, albeit an incident of the legal advice, was not an essential or indispensable part of the legal matters. On a narrow interpretation the lawyer would simply be able to comment on the legal aspects of the transaction and not communicate any non legal concerns to the client.

The lawyer could decline to give the advice sought and simply recommend the client to get that advice from someone else. In this sense, it is not **necessary** that the lawyer give the advice.

The Law Society has already had an approach from the Securities Commission concerning the possibility of reaching some understanding as to what would come within the expression 'a necessary incident of legal practice' and what would not. The difficulty is that ultimately it would fall to the Courts and not the Securities Commission or the Law Society to answer this question.

The Society would like to see the word 'necessary' removed from section 12(d) of the Act and anywhere else where it relates to an incident of legal practice. The Society believes the legal profession could live with an exemption in respect of financial adviser services given as an incident of legal practice.

The Law Society submits that as a matter of policy lawyers should not be subjected to two different regulatory regimes with the attendant compliance costs.

- Lawyers are already fully regulated in every aspect of their practice. There are public protection mechanisms in place which exceed those for any other profession or occupation group.
- Lawyers have fiduciary duties to their clients. Authorised Financial Advisers do not have this kind of obligation.
- Lawyers have a fully developed and refined set of Rules of Conduct and Client Care which have been approved by the Minister of Justice.
- The Law Society operates a comprehensive and user friendly complaints service. Complaints are considered by Standards Committees comprising lay members as well as lawyers. Any Standards Committee decision is open to review by the Legal Complaints Review Officer who is an independent Government-appointed person.
- Lawyers have a comprehensive financial assurance scheme.
- Lawyers have a fidelity fund.
- The Law Society has a long-established continuing legal education division.

We are currently in the process of preparing the Law Society's submissions in relation to the draft Code of Professional Conduct for Authorised Financial Advisers prepared by the Code Committee. It is interesting to note that all of the proposed standards under the Code are met or exceeded by the lawyers' Rules of Conduct and Client Care. Purely by way of example, an AFA must disclose to a client any lack of independence. However, the lawyers' Rules go further and state that a lawyer cannot act where there is any lack of independence. The relevant rule says that a lawyer must be independent and free from compromising influences or loyalties.

A most undesirable outcome of dual regulation of lawyers would be that they would be subject to two separate complaints and discipline regimes under the Financial Advisers Act and the Lawyers and Conveyancers Act. This would allow people to lodge complaints under either or both regimes. Lawyers should not be exposed to that dual process.

These difficulties should go if the word 'necessary' is removed from section 12(d) of the Financial Advisers Act and elsewhere where this appears so that lawyers would be exempt to the extent that the financial advice and services provided are an incident of legal practice.

In similar fashion, where the Law Society in its submissions is seeking an exemption for registered legal executives and law clerks, the provision we have suggested should refer simply to 'an incident of legal practice', omitting in each case the word 'necessary'.

Finally, in paragraph 9.1 of our submissions, we submitted that a general power of exemption would be desirable. In this regard, the Law Society welcomes the statement by the Minister of Commerce earlier this week that the Select Committee will be considering:

- Increasing the powers of the Securities Commission to grant limited exemptions from the regime.
- Increasing the Government's ability to give total exemptions from the regime through regulations.

However, the Law Society is firmly of the view that the lawyers' exemption which it seeks should be brought about by the straightforward amendment to the Act which the Society is recommending,

rather than by regulation. This is in part because any regulation granting an exemption for lawyers could be at odds with the specific lawyer provisions in the Financial Advisers Act.