

21 May 2018

Financial Markets Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140

By email: [faareview@mbie.govt.nz](mailto:faareview@mbie.govt.nz)

### Disclosure Requirements in the New Financial Advice Regime

1. The New Zealand Law Society welcomes the opportunity to comment on the *Disclosure Requirements in the New Financial Advice Regime, April 2018* discussion paper.
2. The discussion paper discusses what disclosure obligations should apply to individuals and firms who give financial advice.
3. The Law Society has no comments to make on the discussion paper, but has considered the proposals in the wider context of the enforcement regime of the Financial Markets Conduct Act 2013 (FMC Act) as proposed to be amended by the Financial Services Legislation Amendment Bill (Bill) currently before select committee.
4. The Bill proposes that a number of existing civil and criminal penalties in the FMC Act will apply to breaches of obligations under the new disclosure regime. Some of these penalties are significant (see details, **annexed**), and their application in the context of the new disclosure obligations could lead to a cautious and legalistic approach to disclosure. That would appear to be contrary to the objectives of effective disclosure outlined in the discussion paper (see objectives 1-4, at page 10). In order to encourage open and effective disclosure it may be necessary for the Financial Markets Authority to provide guidance on their approach to enforcing sections 431N and 431O of the Act.
5. These comments have been prepared with the assistance of the Law Society's Commercial and Business Law Committee. If you wish to discuss this further, please contact the convenor, Rebecca Sellers, via the committee secretary, Jo Holland at [jo.holland@lawsociety.org.nz](mailto:jo.holland@lawsociety.org.nz) / 04 463 2967.

Yours sincerely



Kathryn Beck  
**President**

Annexure

## **Annexure – Proposed changes to criminal and civil liability in the Financial Markets Conduct Act 2013**

### *Disclosure*

The Bill proposes to introduce a new section 431N of the Act, which provides:

“(1) A person who gives regulated financial advice must, at the request of a prescribed person or at the prescribed times or on the occurrence of the prescribed events, make available to a prescribed person the information that is required to be made available under this section by the regulations.

(2) The information must be made available in the prescribed manner.”

Proposed new section 431O prohibits false or misleading statements in information provided under proposed new section 431N.

### *Civil Liability*

Proposed amendments to sections 449 and 484 of the Act provide that certain civil liability orders are available for a contravention or involvement in a contravention of proposed new section 431N. Generally the licensed financial advice provider will be primarily liable for contraventions, but an individual financial adviser or nominated representative could face criminal liability or civil liability as a person “involved in the contravention”.

The Financial Markets Authority can apply for a pecuniary penalty order of up to \$1 million for an individual or \$5 million for an entity.<sup>1</sup> The Court also has wide powers to make compensation orders which can require a financial advice provider to pay to a customer any amount the Court thinks just to compensate that customer for his or her loss. Other civil liability orders that can be sought include orders that the financial advice provider refund money, return property, vary or cancel agreements, or reinstate the parties to former positions.

### *Criminal Sanctions*

False or misleading statements in the disclosure statement expose the financial advice provider to the risk of criminal sanctions including a term of imprisonment for a term not exceeding 5 years, and a fine not exceeding \$500,000 for an individual or, for an entity, a fine not exceeding \$2.5 million.<sup>2</sup>

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<sup>1</sup> Sections 489 and 490 of the Act

<sup>2</sup> Proposed new section 431O and section 511 of the Act