



Australian Government
The Treasury

TSY/AU

Quality of Advice Review

Template for response

August 2022



Consultation process

Request for feedback and comments

Interested parties are invited to provide feedback on the proposals for reform listed in the Quality of Advice Review Proposals Paper using the template in [Appendix 1](#). Consultation will close on Friday 23 September 2022.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses in a Word or RTF format via email. An additional PDF version may also be submitted.

Publication of submissions and confidentiality

All of the information (including the author's name and address) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

View our [submission guidelines](#) for further information.

Closing date for submissions: 23 September 2022

Email	AdviceReview@TREASURY.GOV.AU
Mail	Secretariat, Quality of Advice Review Financial System Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	Enquiries can be initially directed to AdviceReview@TREASURY.GOV.AU

Appendix 1: Consultation template

Name/Organisation: Kit Legal

Questions

Intended outcomes

1. Do you agree that advisers and product issuers should be able to provide to personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?

We agree in principle with the intended outcome.

However, we don't agree with the extent to which hard won gains aimed at increasing the professionalism of the financial advice industry and protecting consumers are rolled back by the proposals in the consultation paper.

We've detailed these views in relation to specific proposals below. In summary, we argue that **substantial gains can be made towards reducing the compliance burden and increasing access to quality advice by the proposed changes to the definition of personal advice and removing the requirement to provide SOAs. We don't support the replacement of the best interests obligations with the 'good advice' standard.**

At the outset, we'd reiterate the four observations that Commissioner Hayne made at the start of his final report in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, being: the **connection between conduct and reward; the asymmetry of power and information between financial services entities and their customers; the effect of conflicts between duty and interest; and holding entities to account.** Commissioner Hayne saw these four aspects of the financial services environment as central to understanding the poor conduct the Commission was formed to interrogate.

We restate them here as we believe that there hasn't been time for the industry to bed down the cultural changes necessary to eliminate the impact of these pre-existing conditions. We understand the desire for change to the current regime, and the attractiveness of the proposed simplification to the benchmark for quality advice – that it be 'good advice'. But we also emphasise the complexity of the financial services industry – both because of its complicated subject matter, as well as its cultural and legal history – and the need to bear this in mind when considering the position of **consumers, most of whom aren't in a position to fully understand this complexity and appreciate its implications for the financial advice they receive.**

What should be regulated?

2. In your view, are the proposed changes to the definition of 'personal advice' likely to:

- a) reduce regulatory uncertainty?
- b) facilitate the provision of more personal advice to consumers?
- c) improve the ability of financial institutions to help their clients?

a) Yes.

b) Taken in tandem with the proposed disclosure changes, we think this change would enable advisers to more frequently provide useful personal advice because the regulatory and commercial burden of providing an SOA is removed. We think this objective is achieved without also removing the best interests obligations.

If the category of 'general advice' is removed (which we don't support) and the 'good advice' standard is implemented, this change must be accompanied by supporting changes (e.g. to disclosure requirements) to deal with providers publishing newsletters, market updates, podcasts etc. These publications would previously have been general advice, but where they're shared with the provider's client group (likely triggering the 'holds information' requirement) and include an opinion or recommendation, they will now be personal advice and subject to the good advice standard. This may well limit a provider's ability to share useful information in a cost-effective manner with its clients, and unfairly disadvantage financial planners whose business model involves building ongoing client relationships (i.e. contributing to an unequal playing field).

c) We agree this change would increase the ability of financial institutions to provide personal advice to their clients. We don't necessarily agree that this always equates with helping their clients or that these institutions are best placed to provide personal advice.

3. In relation to the proposed de-regulation of 'general advice' - are the general consumer protections (such as the prohibition against engaging in misleading or deceptive conduct) a sufficient safeguard for consumers?

a) If not, what additional safeguards do you think would be required?

We understand that the proposals assume that the consumer protections in Part 2 of the ASIC Act (with or without amendment) would provide the safety net for consumers who suffer loss as a result of behaviour that's currently regulated as general advice.

We don't believe these protections are sufficient to protect consumers in the vacuum left by the de-regulation of general advice.

In the absence of a requirement to be licensed to give what's currently general advice, there would presumably be no mandated complaints or compensation process. This leaves specific action by ASIC as the main recourse for any misled or deceived consumers. As a practical matter, ASIC wouldn't appear to have the resources to further expand its enforcement and surveillance capability. Private legal action is often out of reach for individuals, particularly those who've suffered financial loss.

Consumers can be heavily influenced by what is currently 'general advice' on financial products – particularly in seminars and online forums. ASIC's recent research report *Young people and money survey* also noted the role of social media. This research illustrated the impact that financial information (which may well amount to general advice) shared on social channels can have. Of the 28% of respondents who said they followed a financial influencer online, almost two-thirds (64%) said they changed at least one of their financial behaviours as a result.

With respect to social media in particular, we don't think it's sufficient to assume that influencers will come within the expanded personal advice definition as a result of direct messaging or other online interactions. While this may turn on how broadly 'has or holds information' is defined, the information may often not go beyond a social media handle/username. The advent of parasocial relationships further complicates this, where the follower assumes a relationship exists – and acts accordingly – while the influencer has very little or no knowledge of the follower's existence.

This proposal also opens the way for more people to operate in this unregulated space, without any need to have a baseline level of knowledge and experience.

- a) We think the existing safeguard of requiring a licence to provide general advice on financial products should be retained. It enables the providers of these services to be regulated and to have some level of competency in obtaining and retaining an AFSL. It also isn't particularly onerous to obtain an AFSL to provide general advice.

We also think the proposed changes to the definition of personal financial advice and the disclosure requirements largely remove the existing issues with the general advice definition. In short, fixing personal advice fixes general advice. These changes remove the incentive to couch advice in general rather than personal terms, leaving 'general advice' to, appropriately in our view, cover mass communication of opinions about financial products.

How should personal advice be regulated?

4. In your view, what impact does the replacement of the best interest obligations with the obligation to provide 'good advice' have on:

- a) the quality of financial advice provided to consumers?
- b) the time and cost required to produce advice?

a) In our view, 'good advice' is a lower standard than the current standard under the best interests obligations. It also asks consumers to understand that 'good advice' provided by e.g. a bank can (and will likely) be entirely different to 'good advice' provided by a financial adviser (relevant provider). We think this will have a negative impact on the quality of advice.

- **'Benefit':** 'Good advice' will most likely be interpreted as a lower standard than 'best interests' when considering advice given by a non-relevant provider. Putting aside how a court will consider the ordinary meaning of the word 'good' compared to 'best', we suggest the bigger issue is how to determine what level of 'benefit' to the consumer will be necessary to meet the good advice standard. If any demonstrable benefit is sufficient, then we think this may lead to a return to vertical integration models where banks sell financial products at greater benefit to the institution than to the consumer (as long as there's still some evidence of a benefit to the consumer). This should be avoided. For advice given by a relevant provider, good advice will presumably be interpreted in conjunction with the code of ethics creating an extremely broad spectrum for the meaning of 'good advice', and the associated level of enquiry and work on the part of the provider to meet the standard. We don't think relying on the circumstances (e.g. the relationship with the provider, advice fees paid to a relevant provider) make this sufficiently clear for consumers, especially where institutions earn fees indirectly from the consumer in other ways (such as products they issue) and often hold a significant amount of personal information about the consumer.
- **Professional standards:** The proposals assume that the professionalism of the advice industry (relevant providers) and the oversight of licensees will safeguard the quality of advice under the 'good' standard. It follows that a significant amount of advice will be provided outside of the code of ethics and the professional standards by banks, super funds and digital advice providers. In these cases, our understanding is that the proposals contemplate that the licensee will still have to be satisfied that its providers are competent to provide 'good advice', and that this will provide an adequate limit on the complexity of the advice provided by non-relevant providers.

The current regime already allows personal advice to be provided without meeting the professional standards in limited circumstances (based on the definition of 'relevant financial products' under s 910A Corporations Act). The proposed changes must assume this current exemption is

insufficient, and in our view this suggests that the proposals anticipate that providers will be able to give more complex advice than what's currently allowed. We don't believe that non-relevant providers should be able to provide advice beyond the current exemptions (amended as suggested below). All of the advice industry's work in the last few years (in minimum education standards in particular) has been premised on the view that there's a minimum professional standard required for more complex financial advice. The proposals appear to provide no distinction between the advice that (non-relevant) providers employed by e.g. banks and super funds can provide and the complex advice that should rightly be given by a qualified financial adviser (as a relevant provider).

We suggest instead that the current exemption to meeting the professional standards be expanded. The existing definition of 'relevant financial products' excludes basic banking products, general insurance products and consumer credit insurance, allowing providers to give advice on these products without meeting the professional standards. We suggest adding existing superannuation products to this group (i.e. the consumer's existing superannuation fund(s)). This would address the current need for consumers to access simple advice on e.g. contributions to their existing super fund(s). While we understand the review's reticence to introduce additional labels, we think this may be one area where a new label may be beneficial e.g. limited or restricted financial advice.

- Information asymmetry:** The proposals purport to place responsibility for delivering good advice on the provider. However, they also require the consumer to be able to make a proper assessment of the circumstances in which they receive advice and understand the implications this has for the advice they receive. The consumer will be required to understand that the good advice they receive from an advice provider at a bank is going to be different to the good advice they receive from a financial adviser. This is particularly so if the good advice standard is based on 'the circumstances' rather than the information held by the provider. History has shown how difficult this is for consumers to parse. This task is even harder when it comes to digital advice, where algorithms and their inherent biases are entirely opaque. Where banks provide more limited advice on simple products (which is currently the case), a consumer will likely understand the limitations on the advice. Where a bank or super fund is providing comprehensive or more complex advice, it's unlikely a consumer will understand the impacts of not having the protection of the code of ethics. Banks have moved away from providing complex or comprehensive advice after the Royal Commission. The proposals appear to pave the way for them to re-enter this market without all of the consumer protections that were advanced as a result of the Royal Commission.

For these reasons, we don't think it's appropriate to lower the standard from best interests to good advice. Consumers must have the tools to understand the nature of the advice they're receiving and we don't think this proposal equips them appropriately to do so. Instead, we'd suggest expanding the exemption to meeting the professional standards to include existing super funds, as well as implementing the disclosure proposals and the change to the definition of personal advice. The ALRC can then reform and streamline the best interests obligations and safe harbour.

- b) This proposal will greatly increase the giving of advice by financial institutions, super funds and digital advice providers at lower time and cost to current advice models. It's unclear that it would facilitate a huge change in approach for advice by financial advisers who will still be regulated by the code of ethics.

5. Does the replacement of the best interest obligations with the obligation to provide 'good advice' make it easier for advisers and institutions to:

- a) **provide limited advice to consumers?**
- b) **provide advice to consumers using technological solutions (e.g. digital advice)?**

- a) It makes it easier for institutions to provide limited advice. It's not clear exactly how it will impact financial advisers who will still be subject to the code of ethics as we're unsure how these two standards will work alongside each other in relation to limited advice.
- b) Again, it makes it easier for institutions to provide advice digitally while it's unclear whether it will make it easier for advisers to do so as the code of ethics will still apply.

6. What else (if anything) is required to better facilitate the provision of:

- a) **limited advice?**
- b) **digital advice?**

We **believe that the removal of the obligation to provide a SOA will facilitate the provision of limited and digital advice.**

7. In your view, what impact will the proposed changes to the application of the professional standards (the requirement to be a relevant provider) have on:

- a) **the quality of financial advice?**
- b) **the affordability and accessibility of financial advice?**

The answer to this question is highly vexed. The considerations are so entangled that they can't easily be considered separately to answer a) about quality and b) about affordability and accessibility.

We're concerned about the broad impact that the proposed changes to the application of the professional standards will have and we think the following issues should be considered.

- Currently, personal advice can only be provided by financial advisers subject to professional standards. In other professions, only individuals who adhere to the profession's standards can act within that profession, whether for a fee or unpaid. Only doctors can give medical advice. Only lawyers can give legal advice. The proposed changes suggest that non-professionals can give financial advice – so long as it's good and they don't charge for it – without adhering to the financial advice profession's standards.
- The proposals envisage a regime based on 'good advice' that covers the complete advice spectrum from a question answered via a call to an institution's call centre (provider) to highly personalised financial advice in an ongoing relationship with a qualified adviser (relevant provider).
 - The provider's advice can be given at fairly low cost as there's no need to provide disclosure or meet the professional standards. It won't be 'free' as the consumer will likely pay via other fees e.g. product fees paid to the institution and the institution itself will typically gain benefits that go beyond these fees that won't necessarily be clear to the consumer. However, in the moment, a consumer will not be required to pay a direct fee for the advice. There's no reason to think that the advice given in these circumstances will be limited to simple advice e.g. it could cover multiple products and have significant impact on the consumer's financial position.
 - The relevant provider's advice will be more detailed and therefore more costly. The cost will also reflect the need to keep more detailed records and meet the professional standards. It will likely be better quality advice – it won't only be good, but will be required to be in the client's best interests. The client will pay a fee that will reflect not only the better quality of advice but also the increased costs associated with being a relevant provider.
- This creates the so-called unequal playing field. We don't think these two scenarios are playing on separate fields as has been suggested. They're both under the 'good advice' standard, but one type of advice has more significant (and costlier) obligations than the other. There's no real indication of the limits on the complexity of the advice that a provider could give (even taking into account the licensee's obligations). It could be said that market forces will force financial advisers to demonstrate their worth. We think this is too simplistic given the historical conflicts in vertically integrated models of advice which could easily re-emerge.
- Where the field is unequal, there's an incentive to try and make it equal again. This may create a scenario where relevant providers effectively seek to opt-in or opt-out of their professional/ethical duties. It's not clear whether in some cases relevant providers could seek alternative revenue models so that they aren't subject to the professional standards/code of ethics. This would be more likely if the definition of 'good advice' referred to circumstances, rather than information. 'Circumstances' could include the disclaimers attached to the advice.

In the absence of the professional standards, are the licensing obligations which require licensees to ensure that their representatives are adequately trained and competent to provide financial services sufficient to ensure the quality of advice provided to consumers?

a) If not, what additional requirements should apply to providers of personal advice who are not required to be relevant providers?

We think the complexities and conflicts that the proposals will create can't be overcome by the general obligations on the licensee, whether it's the obligation to ensure representatives are adequately trained and competent, or the obligation to ensure the financial services are provided efficiently, honestly and fairly.

a) Our view is that where advice is provided on products that aren't relevant financial products (as already defined in s910A), then the advice should be provided by a relevant provider. For digital advice, the advice generated by the advice tool should be overseen by someone who meets the same training and competency standards as a relevant provider (which is largely already the case given that when seeking a licence to provide digital advice, ASIC generally requires at least one responsible manager to meet the minimum training and competence standards for advisers).

In addition, we suggest expanding the group of products that aren't relevant financial product to include existing super funds. This change addresses a deficiency in the current regime which precludes consumers from accessing simple advice on e.g. contributions to their existing super funds. While we agree that labels have historically been largely unhelpful for consumers, this is one area where a new label like limited or restricted advice may assist consumers in understanding the nature of the advice they're receiving.

Superannuation funds and intra-fund advice

2. Will the proposed changes to superannuation trustee obligations (including the removal of the restriction on collective charging):

- a) **make it easier for superannuation trustees to provide personal advice to their members?**
- b) **make it easier for members to access the advice they need at the time they need it?**

Yes.

Disclosure documents

3. Do the streamlined disclosure requirements for ongoing fee arrangements:

- a) reduce regulatory burden and the cost of providing advice, and if so, to what extent?**
- b) negatively impact consumers, and if so, how and to what extent?**

- a) We agree that this proposal will reduce the regulatory burden and cost of providing advice. We note that any changes need to clarify that the fee consent must be collected by the adviser and not the product issuer, otherwise there will still be duplication between the adviser and product issuer. Where this happens currently, there's often an additional complication caused by the product issuer insisting on their own form of fee consents without having all the information required to populate the remainder of the form.
- b) Re the removal of the backward-looking part of the FDS – the proposed changes appear to shift the content from a client-facing document to a file note (or similar). Presumably this process of reconciling what has been provided versus what was promised still needs to be conducted either annually or more frequently (from both an ethical and contractual viewpoint) but this isn't clear in the proposal. This change merely shifts the evidence of the reconciliation to the adviser's own records. This could also have flow-on effects for ongoing service agreements – the reportability of the promised services will not be as important, and this could lead to ambiguity/uncertainty etc. in service expectations and fee-for-no-service situations.

4. Will removing the requirement to give clients a statement of advice:

- a) reduce the cost of providing advice, and if so, to what extent?**
- b) negatively impact consumers, and if so, to what extent?**

- a) Yes, removing the SOA requirement will reduce the cost of providing advice. It would also eliminate some of the need to qualify clients as wholesale clients purely in order to have flexibility about the way advice is delivered. However, we suggest there should be some sort of framework to assist advisers with what keeping a 'complete record of advice' entails.
- b) We think the absence of any requirement to give a written record of the advice will negatively impact consumers and we question how consumers will be made aware that they can request the advice in writing.

Without written advice, the ability of consumers to properly reflect on the advice they receive is significantly reduced. In the event of a later dispute over the advice, the consumer will only have their own notes to rely on, leaving the adviser as the sole holder of the official version of the advice (according to the proposed record-keeping requirement).

Other professions continue to provide advice in writing – lawyers being an obvious example. Doctors also talk through medical risks, but still provide a written outline of the risks which the patient must sign.

We agree that there's room here for providers to use professional judgment in how advice is communicated and that advice can be provided verbally. But we suggest that a basic framework for providing a record of the advice to the client that outlines what the advice is, why it benefits the client and the key risks involved should be preferred over the complete removal of the existing disclosure regime. This will still substantially reduce the cost of providing advice.

5. In your view, will the proposed change for giving a financial services guide:

- a) **reduce regulatory burden for advisers and licensees, and if so, to what extent?**
- b) **negatively impact consumers, and if so, to what extent?**

We agree with this proposed change.

Design and distribution obligations

6. What impact are the proposed amendments to the reporting requirements under the design and distribution obligations likely to have on:

- a) **the design and development of financial products?**
- b) **target market determinations?**

We agree with these proposals to the extent that personal advice subject to the code of ethics is excluded from the DDO regime, except for the obligation to report product complaints.

Transition and enforcement

7. What transitional arrangements are necessary to implement these reforms?

It's difficult to answer this question comprehensively, but we note there may need to be transitional arrangements to enable licence variations for firms that currently give general advice that would constitute personal advice under the proposed changes.

General

8. Do you have any other comments or feedback?