

Supplemental Submission

to the

Economic Development, Science and Innovation Committee

on the

Financial Services Legislation Amendment Bill

22 May 2018

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following seventeen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - MUFG Bank, Ltd
 - China Construction Bank
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - Industrial and Commercial Bank of China (New Zealand) Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited

Background

3. Thank you for the opportunity to provide further comments on the Financial Services Legislation Amendment Bill (**FSLAB**).
4. This submission is in addition to our written submissions dated 23 February 2018 (**Primary Submission**) and oral submissions on 11 May 2018.
5. NZBA is happy to work further with the Economic Development, Science and Innovation Committee (**Committee**) and officials in relation to the proposals set out in this submission.
6. If you would like to discuss any aspect of the submission further, please contact:

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NZBA's proposal to more effectively monitor conduct that falls below community expectations

7. In our letter to Adrian Orr and Rob Everett dated 1 May 2018 we raised the option of creating a “bad conduct register” which records disciplinary decisions against financial advisers and nominated representatives. The objective of such a register is to reduce the risk of individuals with a history of misconduct moving from one job to another undetected.
8. We have further considered the formation of this register and due to certain issues raised, we propose that, rather than the obligation to create a register, an obligation be created requiring written references to be provided by current and previous employers.
9. Our further analysis of the creation of a “bad conduct register” highlighted the following issues:
 - (a) A large administrative burden would be placed on financial advice providers if all nominated representatives were required to be on the register. A similar approach of registering all nominated representatives was considered when developing the financial service providers register, but ultimately rejected for the same administrative burden issue.
 - (b) Nominated representatives are not proposed to be subject to the statutory discipline regime under the current provisions of FSLAB. In order to record misconduct on the register either: (1) nominated representatives would need to be brought into the FSLAB disciplinary process; or (2) comprehensive processes for registering internal disciplinary action are required in order to ensure natural justice principles are adhered to. That would require a major revision of FSLAB.
 - (c) The Australian proposal for an industry register underpinned by legislation has not been progressed at this stage. Instead, the industry has developed a conduct background check protocol which is operating in practice.
10. We have identified what we consider to be a better approach – that is to create an obligation to provide written references similar to the obligation currently followed in the UK (see SYSC 22.2 of the Financial Conduct Authority's Handbook) which has the following features:
 - (a) A new employer is required to obtain references from the person's current employer and anyone who has been the person's employer in the past six years.
 - (b) The existing and previous employers must provide references as soon as reasonably practicable when requested to do so (provided certain conditions are met), and the existing and previous employers must disclose all relevant information.
 - (c) Existing and previous employers have an obligation to revise references.
11. This written reference obligation would allow financial advice providers to ensure they are fully informed as to the previous conduct of new employees and therefore encourage good conduct through the hiring of employees and address the objective

of making it more difficult for those with a history of misconduct to move from job to job.

12. The written reference obligation could be introduced through a regulation-making power inserted into FSLAB, with the specific regulations developed after further consultation. We have drafted initial regulations to demonstrate the form this regulation could take based on the UK precedent (see **below**).
13. Amongst other things, further detailed consideration is required including:
 - (a) addressing the intersection of the requirement to provide personal information to a third party with the requirements imposed on agencies under the Privacy Act 1993 (and noting that the Privacy Amendment Bill 2018 is currently before Parliament); and
 - (b) employment law implications (including the need to engage with other relevant stakeholders such as any relevant employee unions).
14. We are keen to work with the relevant regulators and government departments to develop this proposal and we welcome the opportunity to engage with other stakeholders including the relevant unions to develop a framework to effectively manage the provision of written references.

Suggested text of regulation-making power to be inserted into section 548 of the Financial Markets Conduct Act 2013

After section 548(1)(u), insert:

- (v) prescribing requirements relating to financial advice providers [or QFEs] obtaining and giving written references:

Suggested text of regulations

[x] Financial advice providers must obtain references

- (1) If a financial advice provider [or QFE] (**A**) is considering employing a person to be a nominated representative or financial adviser [or QFE adviser] (**P**), A must take reasonable steps to obtain appropriate written references from:
 - (a) P's current employer (if relevant); and
 - (b) any financial advice provider [or QFE] who has been P's employer in the past six years.
- (2) Written references can only be requested from financial advice providers [or QFEs] where P is, or was, hired as a nominated representative or a financial adviser [or QFE adviser].
- (3) A copy of any reference obtained by a financial advice provider [or QFE] as required by this section must be provided to P as soon as reasonably practicable if requested by P.

[x] Financial advice providers must give references

- (1) A financial advice provider [or QFE] (**B**) must provide a written reference to another financial advice provider (**A**) as soon as reasonably practicable if:
 - (a) A is considering employing an existing or former employee of B to work as a nominated representative or financial adviser [or QFE adviser]; and
 - (b) A makes a request for a reference in B's capacity as the employee's current or former employer; and
 - (c) B:
 - (i) employs the employee as a nominated representative or financial adviser [or QFE adviser]; or
 - (ii) employed the employee as a nominated representative or financial adviser [or QFE adviser] at any time in the six year period preceding the request in (1)(b); and
 - (d) A indicates to B the purpose of the request.
- (2) B must disclose to A in the written reference all information of which B is aware that B reasonably considers to be relevant to A.
- (3) B is only required to disclose under (1) and (2) something that occurred or existed:
 - (a) in the six years before the request for a reference; or
 - (b) between the date of the request for the reference and the date B gives the reference.
- (4) Referees involved in writing the reference required by this section must:
 - (a) provide the reference in good faith; and
 - (b) without limiting paragraph (4)(a), must not, whether directly or indirectly, do anything or make any representation that is—
 - (i) misleading or deceptive; or
 - (ii) likely to mislead or deceive.
- (5) The written reference must be prepared in accordance with an applicable framework or methodology (if any) issued by the Financial Markets Authority.
- (6) Where a financial advice provider [or QFE] provides a written reference for a current or previous employee, it will not constitute a breach of the requirements under the Privacy Act 1993.

[x] Obligation to revise references

- (1) If at any time a financial advice provider [or QFE] (**B**) has given a reference under **[x]** to another financial advice provider (**A**) about an employee or ex-employee (**P**) of B and since giving that reference B is aware of matter or circumstances which would have resulted in B drafting the reference differently, B must:
- (a) make reasonable inquiries as to the identity of the P's current employer; and
 - (b) subject to subclause (2), give A details of those differences in writing as soon as reasonably practicable.
- (2) B does not need to update A if:
- (a) B is no longer a financial advice provider [or QFE];
 - (b) P has not yet been employed by A and it is no longer intended that A will employ P;
 - (c) A is no longer P's employer; or
 - (d) despite making reasonable enquiries under **(1)(a)**, B does not know whether P is still employed by A; or
 - (e) six years have elapsed since B employed P.
- (3) If at any time B asks A whether P is still an employee of A, and B gave A the reference no more than six years ago, A must answer that question as soon as reasonably practicable.

[x] Immunity from liability for good faith actions

A financial advice provider [or QFE] providing a written reference under **[x]** will not be civilly liable for any consequence as a result of providing the written reference, provided the financial advice provider [or QFE] complied in good faith with the requirements under **[x]**.