

13 May 2008

Clerk of the Committee  
Finance and Expenditure Committee  
Select Committee Office  
Parliament Buildings  
**WELLINGTON**

## **FINANCIAL ADVISERS BILL**

### **Introduction**

- 1 The Legislation Advisory Committee (“LAC”) welcomes the opportunity to respond to the proposed changes to the Financial Advisers Bill (“Bill”).
- 2 The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. The LAC produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.
- 3 This submission is confined to those aspects of the proposed amendments to the Bill that are relevant to the LAC’s role in promoting quality legislation. It does not address the questions posed in relation to the substantive policy of the proposed amendments.
- 4 The LAC does not seek to appear before the Committee in support of this submission.

## **Powers to make Regulations**

- 5 The LAC's chief concerns with the proposed amendments relate to the proposed new regulation-making powers to:
- (a) Enable any other product or class of products to be prescribed as a financial product; and
  - (b) Prescribe certain occupations to be included as financial advisers.
- 6 The LAC Guidelines provide that matters of principle ought generally to be included in primary legislation. The matters proposed to be referred to regulations, such as who is covered by the legislation and in what circumstances, are matters of principle and significant policy that should be included in the Bill itself and subjected to Parliamentary debate.
- 7 Further, the proposed regulation-making powers enable the scope of the legislation to be broadened by regulations. As they would effectively provide the Executive with the power to override an Act of Parliament, they are a type of Henry VIII clause. Such clauses are considered undesirable on the basis that only Parliament should have the power to amend its own laws. A Henry VIII clause should be used only in exceptional circumstances and even then with strict controls.

### *Financial products*

- 8 The stated purpose of the proposed power to make regulations to enable any other product or class of products to be prescribed as a financial product is to ensure that the legislation has appropriate coverage as products develop that are not covered by the statutory definition but are clearly financial products that should be included in the regulatory regime. It is also proposed that the regulation-making process, (rather than the legislation itself) would define those investment products attached to land that are found not be caught by the regime established by the Real Estate Agents Bill.

- 9 The LAC considers that sufficient attention should be given to the type of financial products that should be included in the scope of the Bill at the outset, to minimise any perceived need to provide for regulations to fill in any gaps. Once the Real Estate Agents Bill has been reported back to Parliament, it should be apparent whether investment products that are attached to land will be included within the regulatory scope of that Bill. At that point, amendments to the provisions of the present Bill should be proposed if there is a need to further regulate such financial products. A matter as important as coverage under the Bill should not be deferred to be dealt with by regulations.

#### *Occupations*

- 10 It is also proposed that the Bill include a regulation-making power to prescribe certain occupations to be included as financial advisers. The stated purpose is to “enable regulations to be developed which will identify certain occupations as financial advisers, even if they do not fit the definition of financial advice”. The proposed power would also allow conditions to be applied to exempt or impose additional requirements on any specified occupation.
- 11 Again, the LAC considers that adequate consideration and consultation on the occupations that should be covered by the Bill would enable the Bill itself to comprehensively detail the occupations that ought to be covered by the strict regulatory regime provided for in the Bill. As there will be a significant transition period once the Bill is enacted, this would allow time to amend the Bill if that was found to be necessary.

#### *Inappropriate delegation of Parliamentary power*

- 12 The LAC considers that there is insufficient justification for the inclusion of the proposed regulation-making powers in respect of both financial products and occupations. There does not appear to be a real need for these powers, and the need to bring future products and occupations within the scope of the regulatory regime is unlikely to be of such urgency that it will be necessary to amend the Act by regulation rather than by Parliament itself.

- 13 The LAC is strongly of the view that the proposed regulation-making powers should not be included in the Bill. However, if they are included, they should be drafted in the most specific and limited terms possible and must at all times be consistent with and support the provisions of the empowering Act. The proposed criteria in respect of regulations applying to occupations should be included as an absolute minimum. There should also be similar criteria in respect of regulations applying to financial products. Consideration should also be given to providing for confirmation of any regulations by Parliament, but this should not be regarded as an appropriate substitution for amendment by Parliament itself.

#### **Definition of Financial Adviser**

- 14 It is essential that the application of the Bill is clear. The LAC is concerned that the proposed definition of financial adviser (“being a person whose primary business is the provision of financial advice, or who regularly provides such advice in the course of their business”), is not sufficiently clear. In particular, the use of the word “regularly” is likely to cause difficulty unless it is further defined.

#### **Transfer of Powers from APBs to the Securities Commission**

- 15 In light of the structural problem in the Bill whereby, as currently drafted, it will not actually create any new Approved Professional Bodies (“APBs”) upon its enactment, the LAC supports the transfer of the powers of an APB to the Securities Commission. However, the LAC is concerned to ensure that the distinct functions of the Securities Commission are in fact kept separate if it is to take on this role.
- 16 The LAC reiterates those concerns expressed in its original submission on the Bill not addressed by the proposed amendments, particularly those regarding inappropriate delegation of legislative power and inadequate legislative guidance on the complex array of enforcement powers, civil remedies and criminal offences.