Law Council
OF AUSTRALIA

Office of the President

28 September 2022

Ms Michelle Levy
Quality of Advice Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: AdviceReview@treasury.gov.au

Dear Ms Levy

Quality of Advice Review Proposals Paper

The Law Council of Australia welcomes the opportunity to make a submission to the Treasury regarding the Quality of Advice Review Proposals Paper (**Proposals Paper**).

The Law Council has received contributions from two of its committees:

- Superannuation Committee of the Legal Practice Section (**Superannuation Committee**); and
- Financial Services Committee of the Business Law Section (**FS Committee**).

These committees' responses to the questions raised in the Proposals Paper reflect the diverse policy perspectives and scope of review of each committee. Therefore, the Law Council provides the views of each of the contributing committees separately to ensure clarity of message.

Please contact the following Chairs of the contributing committees should you require clarification or further information:

- Ms Natalie Cambrell, Chair, Superannuation Committee, on (03) 9663 9877 or at ncambrell@khq.com.au; and
- Ms Pip Bell, Chair, FS Committee, on (02) 8556 7560 or at pbell@pmclegal-australia.com.

Yours sincerely

Mr Tass Liveris
President

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Attachment A—Submissions of the Superannuation and Financial Services Committees

Intended Outcomes	
Question 1. **Do you agree that advisers and product issuers should be able to provide personal advice to their customers without having to comply with all of the obligations that currently apply to the provision of personal advice?**	
Superannuation Committee	The Superannuation Committee confines its response to this question (and its responses to questions 2–15) to situations involving a limited class of product issuer, namely, superannuation trustees. Within that context, the Superannuation Committee agrees with the broad proposal to replace the best interests duty, the appropriate advice duty, the duty to warn the client and the duty of priority in Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) with a duty to provide 'good advice'—that is, advice that would be reasonably likely to benefit the client, having regard to the information that is available to the trustee at the time the advice is provided (see the response to question 4 for further details). The Superannuation Committee also agrees with the proposal to replace the requirement to give a statement of advice with a requirement to maintain complete records of the advice provided (and to give a written record of advice to a member on request).
FS Committee	The FS Committee broadly agrees with this concept, but wishes to express concern that, if advice could be given solely in verbal form subject to a responsibility of the advising entity to keep records of the advice, this would create a risk of miscommunication leading to failure to achieve the objective (of 'good advice') because there was no common understanding of: • the basis of the advice, because the adviser may have misunderstood or missed important elements of the background provided by the client; or • the advice itself, because the customer may not have understood or adequately retained the substance of the advice provided. In the FS Committee's view, the core principles of sections 947B and 947C of the Corporations Act are sound, to the extent that they lay down the principles that the advice provided and the basis on which it is provided must be documented and given to the client. However, the FS Committee considers that the accretions of regulatory complexity in relation to the giving of personal financial advice have impacted

	the accessibility and affordability of financial advice to the point that the current approach does not achieve its objectives. The difficulty is to ensure the regulatory framework accommodates the wide variety of circumstances (far beyond the financial planning industry) in which such advice can be and is given. The FS Committee considers that potential solutions to this problem could involve: • further developing the concept of scalability that is applied to other aspects of financial regulation; and/or • expanding the scope of exemptions from the requirement to provide a Statement of Advice.
What should be regulated?	
Question 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?**	
Superannuation Committee	Before the decisions of the Full Federal Court[1] and the High Court[2] in *Australian Securities and Investments Commission v Westpac Securities Administration Ltd*, some may have thought the existing definition of 'personal advice' to be narrow. However, these decisions made it clear that the existing definition is broad. The proposed changes to the definition of 'personal advice' do not seem to go very much further than reaffirming what the existing definition, properly interpreted, already embraces. Nevertheless, the Superannuation Committee considers that the correct interpretation could be made plainer on the face of the section and, to that extent, the proposed changes would tend to reduce any residual regulatory uncertainty. The Superannuation Committee accepts that there may need to be some clarification as to what does and does not amount to 'holding' relevant personal information, particularly where the responsible Australian financial services (**AFS**) licensee is part of a corporate group.

[1] [2019] FCAFC 187.
[2] [2021] HCA 3.

	In isolation, the proposed changes to the definition would seem unlikely to facilitate the provision of more personal advice to members or improve the ability of superannuation trustees to help their members. However, as the Superannuation Committee understands it, that is not the purpose of the proposed change to the definition. Rather, that is the purpose of the proposed changes to the obligations attaching to the provision of personal advice.
FS Committee	The FS Committee supports the proposed change to the definition of 'personal advice' and agrees that it is likely to reduce regulatory uncertainty by shifting the focus from the adviser's perception (as to what information the adviser 'considered', which only the adviser can really know) to the perception of the client (as to what information the client has 'given' to, and is held by, the adviser). However, the FS Committee does not believe that it will address the uncertainty that arises from other information asymmetries such as circumstances where an adviser's organisation holds personal information about a client that may or may not be out of date and may be materially incomplete, or where the individual adviser dealing with the client may or may not be aware of all the information relating to the relevant client which the organisation holds. These information asymmetries risk making the advice bad advice rather than good advice. The other risk is that while financial institutions can provide more personal advice to consumers, the advice is bad advice because of the out-of-date or materially incomplete information held by the institution. The FS Committee considers that paragraph 2(b) is difficult to assess, as the proposal is to broaden the meaning of personal advice. The FS Committee does consider, however, that the Proposals Paper clearly articulates the impediments to consumers' ability to access financial advice and that the proposed changes to the meaning of the term will facilitate the provision of more such advice to consumers.
Question 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?**	
Superannuation Committee	In the Superannuation Committee's view, the general consumer protections—primarily, the prohibition against engaging in misleading or deceptive conduct in section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**)—are very likely to be a sufficient safeguard for consumers. The test of misleading conduct is one that is very familiar to the courts, industry participants, and consumer advocates. It is often not very difficult to demonstrate that the conduct in question was

	misleading. So much is illustrated by the fact that some superannuation trustees (and other AFS licensees) have been submitting numerous breach reports to ASIC in connection with paragraph 912D(4)(b) of the Corporations Act, which renders a contravention of subsection 1041H(1) of the Corporations Act or subsection 12DA(1) of the ASIC Act a significant breach of a core obligation and therefore a reportable situation for ASIC breach-reporting purposes. The Superannuation Committee also notes the proposal to the effect that payments and other benefits in respect of what is currently general advice would continue to be subject to the conflicted remuneration provisions. The Superannuation Committee considers this to be an important safeguard, in addition to the prohibition against misleading or deceptive conduct. The Superannuation Committee understands that the existing general consumer protections would also apply to misleading conduct of unlicensed providers, though the penalties for licensed providers of engaging in misleading conduct might also extend to cancellation of their Australian financial services licence (**AFSL**) or other penalties imposed in connection with their obligations as licensees.
FS Committee	The FS Committee is concerned that the focus on outcomes rather than process, and the de-regulation of general advice, would increase the risk of consumer harm and decrease the efficiency of current consumer protection enforcement measures. Long experience shows that even the clearest allocation of responsibility for compliance outcomes to industry is not effective unless there is an actual and perceived real risk of those responsibilities being enforced. This would require a radical increase in the resources available to the Australian Financial Complaints Authority and ASIC in order to maintain the current level of compliance outcomes. The AFSL regime increases that real and perceived risk of non-compliance by requiring a 'ticket to the game' for entities wishing to provide general advice and extends the range both of regulatory options at ASIC's disposal to influence behaviour and of options for enforcement action beyond those that would otherwise be available under Part 2.2 of the ASIC Act alone. For example, the question arises as to whether ASIC will be able to address the root cause of systemic or ongoing issues generating consumer concerns with a provider of general advice if it cannot impose licence conditions or obtain an enforceable undertaking to strengthen the compliance framework of the entity. There is much academic research and industry data to suggest that preventative controls to address a policy objective, such as protecting consumers, are more effective than civil or criminal enforcement after harm has occurred. Further, as the AFSL breach-reporting regime would no longer apply, ASIC would be more reliant than currently is the case on consumer complaints and its own surveillance program to identify potential

	concerns for investigation. As ASIC actively relies on information gathered from breach reports to achieve its mandate of protecting consumers, it follows that de-regulation of general advice would therefore need to be supported by increased regulatory resources to compensate for the loss of these sources of industry intelligence and resulting increased reliance on other demonstrably less reliable and less efficient means of gathering information about industry conduct and consumer harm. A second, related, consideration is the intangible nature of financial services, and the difficulty that consumers face in assessing the quality of 'good' financial advice or products without the 'signal' that an AFSL provides. The 'barrier to entry' that obtaining a licence provides with obligations of organisational competence, oversight and adequacy of resources, and the corresponding constraint on the conduct of the licensee arising from the potential risk of its loss, are difficult to replicate in a de-regulated model. The efficiency of any regime reliant on 'after the fact' tools such as infringement notices, criminal and civil penalties, compensation, and other measures such as the voiding of unfair terms requires harm to occur, with a corresponding human cost, before the process of potentially removing a bad actor from the industry or motivating them to address the harmful behaviour can even begin. Accordingly, the additional consumer safeguards that the FS Committee considers would be required to address the consequences of the de-regulation of general advice would need to include: • readily accessible measures to address the information asymmetry faced by consumers attempting to assess the quality of the advice they have or are to receive; • readily accessible and efficient complaint-handling mechanisms to deal with consumer concerns effectively, efficiently, and fairly; • measures such as a negative licensing or other regime to impose consequences on entities engaging in sufficiently serious contraventions and remove them from the industry, with regulators that are sufficiently resourced for this to happen with sufficient frequency to be perceived as a real risk and therefore to act as a real constraint on industry behaviour; and • preservation of the current breach-reporting obligation or replacement with other intelligence gathering powers for regulators.

How should personal advice be regulated?	
Question 4. **In your view, what impact does the replacement of the best interests 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?**	
Superannuation Committee	In the opinion of the Superannuation Committee, the replacement of the best interests obligations with the obligation to provide 'good advice' is very likely to improve the quality of financial advice provided to consumers because it will focus attention on the content of the advice. The 'best interests' obligation in section 961B of the Corporations Act is not directed at the content of the advice. The decision in *ASIC v Dixon Advisory & Superannuation Services Ltd* [2022] FCA 1105 is a recent illustration of this (see paragraphs [28]–[29]). The 'best interests' obligation can be satisfied by taking a series of steps (or 'ticking a number of boxes') when preparing personal advice. It is possible for the steps to be complied with and yet for advice to be produced that does not benefit the client. A duty to provide 'good advice' would focus on the content and suitability of the advice (assessed as at the time it is given), rather than on the process by which the advice was formulated. This seems to be a much more direct and targeted way of regulating the quality of advice. In the Superannuation Committee's opinion, the replacement of the best interests obligations with an obligation to provide 'good advice' appears likely to reduce the time and cost required to produce advice; though it might be viewed as a more onerous obligation for the provider to ensure that only 'good advice' is given. To the Superannuation Committee's knowledge, some trustees feel that, in the absence of taking each of the steps in subsection 961B(2) of the Corporations Act, and creating detailed records of the nature and extent of each such step, it will be assumed that the trustee has breached section 961B(1). At this early stage (of the overall process of the Quality of Advice Review, the Government's response to Treasury's report, and any exposure draft legislation ultimately released for consultation), the Superannuation Committee simply seeks to identify its broad support for the formulation: that is, 'good advice' is advice that would be reasonably likely to benefit the client, having regard to the information that is available to the provider at the time the advice is provided. At this early stage, there are differing views within the Superannuation Committee as to whether any further refinement may be necessary or appropriate. If there is to be any refinement, then perhaps it would assist to make it clear that a provider

	should be expected to seek further information from the client where this is necessary to provide 'good advice' about the subject matter.
FS Committee	In the FS Committee's view, the replacement of the best interests obligation with an obligation to provide advice that is reasonably likely to benefit the client is appropriate in some circumstances, such as a superannuation fund call centre, but is not sufficient in all cases. For example, without the obligation to prioritise the interests of the client, a financial planner could usurp investment opportunities rightfully belonging to the client as long as the client was slightly better off than before. To trust that personal advisors will place professional and ethical conduct concerns ahead of their own self-interest is not justified in the light of the recent experience of participants in the sector. However, the biggest impact on the time and cost of producing advice is, in the FS Committee's view, the need to keep records. This is because of: • the potential for the quality of advice to be assessed with the wisdom of hindsight by unhappy clients on the one hand; • the risk of records generated for the use and benefit of one party only to be potentially self-serving on the other; and • the need to provide clarity of both the advice itself and the facts and other circumstances on which it is based in order for the client to be able to consider and assess its relevance and usefulness, determine what to do with it, and act accordingly. Another impact on the time and cost of producing advice is the approach ASIC has taken to regulating the best interests obligation, treating the safe harbour steps as a legal requirement rather than merely what they are—namely a safe harbour that is optional.
Question 5. **Does the replacement of the best interests 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)?**	
Superannuation Committee	The Superannuation Committee anticipates that the answers to questions 5(a) and 5(b) are 'yes' and 'yes' respectively, for the same reasons as the reasons given in response to question 4.

FS Committee	In the FS Committee's view, the replacement of the best interests obligation with an obligation to provide advice that is reasonably likely to benefit the client would make it easier to provide limited advice and to use electronic means of communication by eliminating prescriptive disclosure requirements. However, the FS Committee is concerned that leaving it to the advising entity to determine how to achieve these outcomes places a great deal of faith in market mechanisms that have not worked well in the past. In the FS Committee's view, a change of this magnitude should not be made without further careful analysis and consultation as to the potential for consumer harm.
Question 6. **What else (if anything) is required to better facilitate the provision of:** **a) limited advice?** **b) digital advice?**	
Superannuation Committee	The Superannuation Committee does not have anything to suggest in response to this question.
FS Committee	The FS Committee does not seek to respond to this question.
Question 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?**	
Superannuation Committee	As the Superannuation Committee understands it, the proposal is to narrow, slightly, the existing definition of relevant provider. A body corporate is not currently a relevant provider and that would remain the case under the proposal. Under the current law, an individual can be required to be a relevant provider (and register as such with ASIC) if they provide personal advice about specified kinds of financial products to retail clients. The proposal is that a provider of personal advice is not a relevant provider where none of the following applies: • the client is paying a fee for the advice;

	• the provider (or the provider's authorising licensee) is receiving a commission in connection with the advice; • there is an ongoing advice relationship between the adviser and the client; or • the client has a reasonable expectation that such a relationship exists. The proposal would seem to be likely to have a modest positive impact on the affordability and accessibility of financial advice. And yet it would seem unlikely to have a negative impact on the quality of financial advice, as the duty to provide 'good advice' would apply regardless and should be a significant matter for a licensee to address in determining what standards its representatives will need to satisfy in order to provide 'good advice' to customers. The Superannuation Committee notes that concerns have been expressed that personal advice could then be provided by people who are inadequately qualified. However, the Committee also notes that the duty to provide 'good advice' would still apply and this is likely to be a sufficient protection (i.e. a person who is unable to provide 'good advice', due to being inadequately qualified in respect of the subject matter of that advice, would not be complying with the duty if they do give advice).
FS Committee	The FS Committee does not seek to respond to this question.
Question 8. **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 persons who are not required to be relevant providers?**	
Superannuation Committee	The duty referred to in this question, namely the duty in paragraph 912A(1)(f) of the Corporations Act, is not the only relevant duty. There is also the duty in paragraph 912A(1)(ca), under which the licensee must take reasonable steps to ensure that its representatives comply with financial services laws. However, the more relevant duties would seem to be those in Subdivision F of Division 2 of Part 7.7A. The Proposals Paper flags the removal of Subdivisions B (best interests), C (appropriate advice), D (incomplete information) and E (conflicts/priority), but it does not flag the removal of Subdivision F (licensee responsibilities). The Superannuation Committee understands that Subdivision F would continue but would apply (instead) in relation to the new 'good advice' duty. In this way, the licensee would have to take

	reasonable steps to ensure that its representatives complied with the new 'good advice' duty (section 961L). But, much more significantly, if a representative contravened the new 'good advice' duty, the licensee would, automatically, also contravene that duty, except where it was not the responsible licensee (section 961K(2)). In this way, the Superannuation Committee submits there is in fact nothing more to do in terms of imposing 'additional requirements' on the applicable licensee.
FS Committee	The FS Committee does not seek to respond to this question.
Superannuation funds and intra-fund advice	
Question 9. **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?**	
Superannuation Committee	The impact of repealing section 99F of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) is difficult to predict as superannuation trustees would, as recognised in the Proposals Paper, still be subject to a range of other obligations in relation to providing personal advice. The Superannuation Committee broadly supports the proposal to amend the sole purpose test to make it clear that providing personal advice can fall within the role of a superannuation trustee—to the extent the provision of such advice concerns a member's superannuation interests and not broader financial advice, but also clarifying that personal advice about a member's superannuation interest can (and should, where relevant) take into account a member's non-superannuation financial position including (as suggested in the Proposals Paper) their family situation and social security entitlements. The existing law is unclear and uncertain. There is no mention of providing advice in section 62 of the SIS Act. In fact, paragraph 29E(5A)(b) of the SIS Act reflects a legislative assumption that providing personal advice may not fall within the role of a superannuation trustee. The Superannuation Committee submits that the expansion of the sole purpose test to provide for advice would clarify the operation of the law and then, as a consequential amendment, section 29E(5A)(b) could also be repealed. The Superannuation Committee also supports the proposal to amend the law so that a superannuation trustee can pay a fee from a member's superannuation account to an adviser, on the member's direction, for personal advice provided to the member about the member's interest in the fund. The Superannuation Committee considers that this proposal, if implemented, would improve regulatory

	certainty for superannuation trustees (and bring the law into conformity with longstanding and widespread practice). Superannuation trustees would still be required to comply with their obligations under the statutory covenants in terms of engaging with advisers, the kind of advice made available to members, and the charges imposed.
FS Committee	The FS Committee does not seek to respond to this question.
Disclosure documents	
Question 10. **Do the streamlined 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?**	
Superannuation Committee	In the Superannuation Committee's view, there is no point in continuing to require annual fee disclosure statements, given ongoing fee arrangements need to be renewed annually in any event. To the extent advice fees are charged to superannuation accounts, the advice fees deducted are already required to be recorded as transactions against a member's/consumer's superannuation account (under the Corporations Act requirements for periodic statements).
FS Committee	The FS Committee does not seek to respond to this question.
Question 11. **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?**	
Superannuation Committee	In the Superannuation Committee's view, it is very difficult to see how removing the requirement for a provider to give a statement of advice (**SOA**) could negatively affect members who receive personal advice. The Superannuation Committee accepts that an SOA may be useful to the extent it permits ASIC to form a view on whether an adviser has complied with the tick-a-box steps in the 'best interests' duty. However, even then, ASIC could require the superannuation trustee to provide a record of advice

	(in the same way that it is proposed the member could) and so ASIC could still obtain the information it needs.
FS Committee	The FS Committee does not seek to respond to this question.
Question 12. **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?**	
Superannuation Committee	In the Superannuation Committee's view, the more flexible approach to providing a financial services guide will reduce regulatory burdens for providers and licensees, and is unlikely to adversely impact consumers because the relevant information will still be required to be available.
FS Committee	The FS Committee does not seek to respond to this question.
Design and distribution obligations	
Question 13. **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?**	
Superannuation Committee	In the Superannuation Committee's view, it is very difficult to see how changing the reporting requirements, in the limited way proposed, would make any difference to either of those matters.
FS Committee	The FS Committee does not seek to respond to this question.

Transition and enforcement	
Question 14. **What transitional arrangements are necessary to implement these reforms?**	
Superannuation Committee	In the Superannuation Committee's view, it is difficult to see, given the nature of the proposals, how significant transitional arrangements would be necessary. It is difficult to identify anything in the proposals that would prevent a trustee, who did not want to make any changes to their advice-giving activities, from declining to make any changes to their advice-giving activities. That is, the Superannuation Committee considers providers might continue to offer their clients an SOA and, under the proposed new regime, they will need to ensure that they have given 'good advice' whether in the terms of the SOA or otherwise.
FS Committee	The FS Committee does not seek to respond to this question.
General	
Question 15. **Do you have any other comments or feedback?**	
Superannuation Committee	The Superannuation Committee notes that Jeremy Cooper recently wrote in an article for the *Australian Financial Review* that the Quality of Advice Review 'needs to be commended for going big-picture and gutsy' in exposing its early thoughts on 'improving the regulation of financial advice given to Australian consumers'.[3] He also said that this is an 'opportunity to start afresh, rather than clinging to the flawed ideas of the past'.[4] The Superannuation Committee shares both these sentiments. The regulation of financial advice, and the intersection between financial advice and superannuation, have been unsatisfactory for a long time. There is a lot of remedial action required. The Proposals Paper sets out remedial action that the Superannuation Committee broadly supports.

[3] Jeremy Cooper, 'Financial advice review should start again, not cling to flawed ideas', *Australian Financial Review* (online, 6 September 2022) <https://www.afr.com/policy/tax-and-super/financial-advice-review-should-start-again-not-cling-to-flawed-ideas-20220905-p5bfml>.
[4] Ibid.

FS Committee	At a high level, the FS Committee is supportive of measures that would simplify and streamline the regulatory regime, provided that an adequate level of consumer protection is preserved. There are plenty of examples of widely reported cases of consumer harm that involved financial advisers, some of which are referred to in this submission. The FS Committee recommends that some of these scenarios should be 'stress tested' under any proposed alternative regulatory framework to see whether the outcome for the consumer would be better, worse, or the same if the relevant conduct was to occur under proposed new rules. If the consumer outcome would be worse under any proposed new rules, then this would suggest that they are too 'light touch' and therefore not appropriate. In view of the complexity and significance of these reforms, and the volume of other contemporaneous regulatory reform proposals on which input is sought, the FS Committee considers that the length of time allowed for consultation on the Proposals Paper was insufficient to give a fully considered response.