



Law Council
OF AUSTRALIA

Proposed measures in response to PwC

The Treasury

4 October 2023

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Table of contents

About the Law Council of Australia	3
Acknowledgements	4
Introduction	5
The consultation process	5
Reform of promoter penalty laws	6
Tax Practitioners Board reforms	7
Breadth of the proposed reforms	8
Scheme of the Act.....	9
Publication	9
Whistleblower protections	9
Alignment with the Public Interest Disclosure Act.....	10
Extension of protections to disclosures to other bodies.....	10
Information sharing	11
Suspected Breaches of Confidence	11
Information Sharing with Professional Disciplinary Bodies	12
Disciplinary schemes	15
Information protection and disclosure	16

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council acknowledges the assistance of the Law Society of New South Wales in preparing this submission. It is also grateful for the contributions of its Business Law Section's Taxation Committee.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide feedback to the Treasury in relation to a series of proposed measures in response to events involving PwC.
2. This submission provides general observations on the consultation process—particularly the highly restrictive timeframes in which to respond—in addition to specific feedback on the following aspects of the consultation process:
 - reform of promoter penalty laws;
 - Tax Practitioners Board reforms;
 - whistleblower protections; and
 - information sharing.
3. The Law Council welcomes the opportunity to remain engaged with the proposed reform measures as they progress, and looks forward to elaborating on the below remarks, which should be regarded as preliminary for current purposes.

The consultation process

4. There can be no doubt that the PwC scandal has highlighted the need for a review of the regulatory arrangements that apply to tax advisers. However, while the Law Council commends the Government on taking decisive action, it is concerned that the Government's plan to legislate some of the changes this year leaves little room for effective and considered consultation.
5. The consultation process should allow external stakeholders sufficient time to provide considered technical input and share industry concerns, particularly where the proposed amendments concern laws with potentially wide-ranging consequences. A truncated consultation process risks introducing laws that are not fit for purpose and which may require subsequent amendments.
6. A two-week consultation period does not provide adequate time for effective consultation, especially for representative bodies such as the Law Council, which have an obligation to consult their membership on matters of policy.
7. In relation to the promoter penalty amendments, these laws already carry severe consequences for tax practitioners and the proposed changes only amplify that severity. The Law Council recommends that the Government reconsider the length of the consultation period to receive properly considered input.
8. Finally, the Treasury's *Government response to PwC tax leaks scandal* Factsheet states that the Government proposes to issue discussion papers on some of the other proposed measures.¹ The Law Council considers that it would be beneficial for the affected government agencies to receive feedback from professional bodies, State and Territory regulatory agencies, and other non-government stakeholders (even if only through a limited consultation process) before releasing any further discussion papers. This is to avoid the discussion papers being based on misconceptions, and to ensure that the process produces an outcome in which there is public confidence.

¹ The Treasury, *Government response to PwC tax leaks scandal* (Factsheet, 19 September 2023) 6-8.

Reform of promoter penalty laws

9. The Law Council supports the Government's desire to strengthen the integrity of the tax system, including by ensuring that the existing promoter penalty laws operate appropriately. However, it considers that one of the questions for the consultation process is whether legislative amendments are necessary in the first place.
10. The simple fact that the promoter penalty laws have only been applied a handful of times is not of itself a sufficient reason for legislative changes. Likewise, the fact that a few individuals were willing to use confidential government information to gain a financial advantage does not mean the laws do not work. Nor does the behaviour of a few mean that the existing penalties—which are substantial—do not operate as a sufficient deterrent.
11. The Law Council supports deterring the promotion of tax avoidance and tax evasion schemes. While it is plain that the matters reported with respect to PwC warrant serious consideration, caution should be taken to ensure that desirable behaviour is not also deterred. It is important that taxpayers retain the right to take independent tax advice. This not only assists taxpayers in understanding their obligations, but the Commonwealth is also assisted when taxpayers have the benefit of advice that ensures they comply with the law and pay their tax liabilities.
12. Higher sanctions, particularly such as those proposed for a significant global entity under the new scheme, may not solely increase deterrence. Faced with severe penalties, some may well be deterred from non-compliance. However, higher sanctions may also induce other previously complying advisers to limit or temper their participation, thereby potentially compromising the independent advice sought. The Law Council acknowledges that the new 10 per cent of aggregated turnover penalty, at Item 11 of the *Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: PWC Response—promoter penalty laws reform* (the **Draft Promoter Penalties Bill**) is designed to deter entities from treating civil penalties as a mere cost of doing business. Yet, the penalty amount will be unrelated to the actual benefit received and may, therefore, appear disproportionate.
13. The Law Council is also concerned that technical breaches, where there is no intention to promote a scheme, may be caught under the Draft Promoter Penalties Bill. For example, the dissemination of information by tax advisers about how a tax is applied is often a useful tool to help taxpayers understand the outcome of a particular court case and may imply that taxpayers should consider whether the outcome is applicable to their own case. If the decision is later reversed (or a tax avoidance scheme is subsequently found to have existed) the question arises whether the dissemination of the information, in the first instance, would be caught. Notably, marketing material may fall within the new definition of 'benefit'.
14. The Government's review of tax advisers should, therefore, not focus solely on increased regulation and penalties as a way of combating unacceptable adviser behaviour. One of the ways in which the Australian Taxation Office (**ATO**) has successfully managed to shape both taxpayer and adviser behaviour in the context of tax schemes is through its Product Rulings and Taxpayer Alerts. These types of products have largely eliminated a number of mass-marketed schemes, and have achieved this without imposing additional compliance burdens on taxpayers. At the same time, having a regulator willing to identify and articulate the mischief sought to be stopped fosters an environment of transparency. This is to be encouraged.

15. The Taxation Committee of the Law Council's Business Law Section makes the following specific comments on the Draft Promoter Penalties Bill:
- Proposed subsection 290-50(4B) appears to provide that each partner in a partnership that is a significant global entity is potentially subject to penalties of as much as 10 per cent of the partnership's turnover or 2.5 million penalty units. Given that large partnerships may have many hundreds or even thousands of partners, the proposed amendment is extraordinary considering that only one lot of such penalties would be imposed on a corporation under proposed subsection 290-50(4A).
 - Proposed subsection 290-50(4B) is made more draconian by proposed subsection 440-30(5), which precludes a partner from relying on the non-involvement defences in existing subsection 440-30(4).
 - The Taxation Committee considers that the proposed amendments are excessive. Either the same treatment should apply to partnerships and corporations, or individual partners should be able to rely on the defences in subsection 440-30(4).
 - The Taxation Committee is concerned about the proposed lowering of the threshold for the application of the penalties such that an entity need only receive a 'benefit', rather than 'consideration' (subsection 290-50(1)). This change will substantially widen the scope of the provisions to apply to persons and entities which would not otherwise be regarded as engaging in 'promotion' of tax schemes (or of mass-marketed schemes). For example, an employee of a business may be treated as a 'promoter' simply for carrying out tasks related to their employment, such as commenting on a range of options for a potential business restructure.

The explanatory materials accompanying the Draft Promoter Penalties Bill would seem to suggest that, if the employee were to receive a 'benefit' (which might be as limited as a positive performance review), they could be subject to substantial personal penalties. Further, in such a situation, the employee would not be protected by the 'employment' exception in subsection 290-55(8) as the penalty would not be imposed on their employer.

Tax Practitioners Board reforms

16. In principle the Law Council supports the measures contained in the *Exposure Draft Treasury Laws Amendment (Measures for consultation) Bill 2023: Tax Practitioners Board* (the **Draft TPB Bill**). The main exception is the proposal to amend paragraph 60-125(2)(b) of the *Tax Agent Services Act 2009* (Cth) (the **TASA**) by the addition of the proposed new subparagraph (v). While the Law Council fully supports the objective of that proposed new subclause (to publicise adverse decisions against an entity whose registration has been deliberately allowed to expire), the Law Council believes the proposed objective can be better achieved by amendments that will be more effective, not have unintended consequences, and be consistent with the scheme of the Act.
17. In the Law Council's view, the proposed new subclause is too broad, and inappropriate to remedy the mischief at which it is directed, so could have unacceptable consequences. Additionally, it is out of place and out of keeping with the scheme of the TASA by conflating registration, investigations and publication—all of which are dealt with separately by the TASA. The changes the Law Council

suggests to the existing section dealing with the expiration of registration (section 20-35) are modelled on the 2021 amendments to the TASA (the **2021 Amendments**) to overcome voluntary termination of registration to avoid an investigation and sanctions.² Similarly, the changes it suggests should overcome the deliberate expiration (and non-renewal) of registration in order to avoid an investigation and sanctions. The Law Council respectfully submits that these changes will remedy the mischief without having the unintended consequences.

Breadth of the proposed reforms

18. Existing subsection 60-125(2) of the TASA comes under the general heading 'Outcomes of Investigations'. Subsection (1) deals with investigations in relation to applications for registration; subsection (2) deals with investigations in relation to whether 'the conduct breaches this Act'. Where the Tax Practitioners Board (TPB) after an investigation, finds conduct that breaches the TASA, it currently has four options of action to take in relation to that conduct:
 - impose administrative sanctions under subdivision 30-B;
 - terminate registration under subdivision 40-A;
 - apply to the Federal Court of Australia for a civil penalty under subdivision 50-C; or
 - apply to the Federal Court for an injunction under section 70-5.
19. All of these options are based on expressly-referred-to substantive provisions of the TASA. Additionally, the first two options are subject to the publication requirements of section 60-135, which would be substantially expanded under the Draft TPB Bill. Publication of the outcome of civil penalty and injunction proceedings will take place in accordance with the requirements of the Federal Court. Accordingly, the existing section 60-125 deals only with the outcome of investigations and, in particular, sanctions which may be imposed under the TASA or further court procedures. All existing options under paragraph 60-125(2)(b) deal only with *sanctions* or further action—not on *publication*, which is expressly provided for under section 60-135.
20. The proposed new subparagraph 60-125(2)(b)(v) is dangerously wide enough to be misinterpreted as an open-ended additional alternate option to the four available under the present section (60-135(2)(b)). As currently drafted it would appear to offer the Board an open-ended or unrestricted option to publish details of a contravention as an alternative to imposing sanctions or applying to the Federal Court.
21. Paragraph [1.19] of the relevant draft Explanatory Materials sets out the reason for the proposed new subparagraph 60-125(2)(b)(v) by instancing a situation 'where entities were registered at the time the investigation commenced, but had their registration expire without renewal before the conclusion of the investigation'.³ To the extent that a deliberate failure to renew registration impedes the conduct of an existing investigation or precludes a pending investigation, then the Law Council would support specific amendments modelled on subsection 40-5(3) in the case of individuals, subsection 40-10(2A) in the case of partnerships and subsection 40-15(2A) in the case of companies. These subsections were introduced as amendments in 2021 to overcome a similar situation to that referred to in

² *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* (Cth).

³ Exposure Draft Explanatory Materials, *Treasury Laws Amendment (Measures for consultation) Bill 2023: Tax Practitioners Board*, [1.19].

paragraph [1.19] of the relevant draft Explanatory Materials (that is, registration being surrendered to defeat or impede current or impending investigations). The Law Council respectfully suggests that similar wording to those subsections would overcome the mischief referred to in the above-mentioned paragraph [1.19].

22. Specifically, section 20-35 could be amended by inserting new provisions (covering all entities—individual, partnership and company) that, notwithstanding subsection (b), registration would not expire at the end of the current period if the TPB considers that due to a current investigation or any new investigation within 30 days it would be inappropriate for such registration to expire. Similar to the result achieved by the 2021 Amendments, this would preserve the registration for the purposes of completing existing investigations and commencing new investigations. This would be even more effective if and when the registration period is reduced from three years to one year. Because the expired registration of an entity is extended by the proposed amendments to section 20-35, the sanctions of termination or suspension under paragraph 60-125(2)(b) would remain appropriate—just as they remain appropriate in relation to entities that purport to voluntarily surrender their registration.

Scheme of the Act

23. There are specific provisions in the TASA dealing with, for example:
 - commencement and duration of registration (section 20-35);
 - investigations (Subdivision 60-E); and
 - publication (Subdivision 60-F).
24. By dealing with the specific mischief described in paragraph [1.19] of the relevant draft Explanatory Materials by appropriate amendments to the relevant section covering registration (section 20-35), the scheme of the TASA would be maintained for the benefit of all stakeholders. As in the case of the 2021 Amendment, the scheme of the TASA and its logical sequence would be maintained.

Publication

25. The current provisions of section 60-135 of the TASA will apply to any sanctions imposed by existing paragraph 60-125(2)(b). This is similar to that which applies to entities that seek to avoid investigation and sanctions by voluntary surrender after introduction of the 2021 Amendment. The proposed amendment to section 20-35, suggested above, should have the effect of continuing the registration of entities that would otherwise have deliberately expired and not been renewed in order to avoid any investigation and the imposition of any sanction as a result of breach.

Whistleblower protections

26. The proposed measures in the *Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: Extending tax whistleblower protections* (the **Draft Whistleblower Protections Bill**) include an expansion of whistleblower protections. These would extend existing protections to a new range of disclosures related to potential misconduct by tax practitioners, including disclosures to the TPB and relevant professional associations, bodies that represent the professional interests of disclosers and registered organisations under the *Fair Work (Registered Organisations) Act 2009* (Cth).

27. In principle, the Law Council is supportive of broadening the protections for whistleblowers through the expansion of bodies to which disclosures may be made. However, it provides the following observations for further consideration.

Alignment with the Public Interest Disclosure Act

28. The reforms would establish evidentiary burdens and procedures regarding claims for protection that align with the *Public Interest Disclosure Act 2013* (Cth) (the **PID Act**). The Law Council has long-held concerns with the operation and complexity of the PID Act, which are beyond the scope of the current consultation. However, it notes that the Treasury's Factsheet refers to a statutory review of tax and corporate whistleblower laws commencing in late 2024.⁴ The Law Council will closely engage with this review.
29. One matter that the Law Council considers worthy of further consideration is the prospect of conflict between the protections under Part IVD of the *Taxation Administration Act 1953* (Cth) (**TAA**) and Part 9.4AAA of the *Corporations Act 2001* (Cth) (the **Corporations Act**) when a disclosure qualifies for protection under both schemes in whole, or in part.
30. The proposed reforms have the potential to create inconsistent levels of protection between the TAA and Corporations Act schemes, and there is a need to consider how this potential inconsistency is resolved. Such a scenario is a further example of the need for a desirability of a more cohesive and unified whistleblower protection scheme, supported by a centralised whistleblower protection authority to have oversight of the implementation of the whistleblower regime for both the public and private sectors.

Extension of protections to disclosures to other bodies

31. Existing subsection 14ZZT(3) of the TAA permits disclosures to legal practitioners for the purpose of obtaining advice or representation with respect to whistleblower matters, which provides a clear delineation as to how far the disclosure protection currently goes.
32. Proposed subsection 14ZZT(3A) will extend protections for disclosures to any of the following:
- a professional association that has regulatory functions or provides professional career support or development to its members;
 - a body that represents the professional interests of the discloser;
 - an organisation registered under *the Fair Work (Registered Organisations) Act 2009* (Cth).
33. Further, proposed subsection 14ZZT(3B) extends protections to disclosures of information made to medical practitioners or psychologists.
34. The Law Council supports the broadening of whistleblower protections to better support eligible disclosers in obtaining assistance in the process of whistleblowing. However, it notes that no further guidance is provided in the Draft Whistleblower Protections Bill or relevant explanatory material as to which bodies will be deemed

⁴ The Treasury, *Government response to PwC tax leaks scandal* (Factsheet, 19 September 2023) 11.

'professional associations' that provide professional career support or development to members, or bodies that 'represent the professional interests' of the disclosure.

35. Such terminology could arguably extend to a broad range of entities, and (unlike the concurrent information sharing reform proposals, which envisage a prescribed list of bodies), there may be a degree of uncertainty as to how far these provisions (and therefore the protections) extend. This creates the potential for very broad dissemination of disclosures, with risks to the security of that information. Further, the much wider scope proposed for section 14ZZT risks the linkage to the disclosure being so remote that the provisions become unwieldy.
36. Finally, the Law Council queries whether consideration should be given to placing limitations on how information disclosed under subsections 14ZZT(3A) and 14ZZT(3B) may be further disclosed by recipients. Current permitted disclosures to legal practitioners under subsection 14ZZT(3) are subject to obligations of confidentiality, which are protected by privilege, and therefore do not create unacceptable risks of undesirable disclosure of such information. The same obligations are not necessarily in place for the additional bodies envisaged in the reform proposals, and the Law Council invites the Treasury to consider whether limitations on secondary disclosure are required in these instances.

Information sharing

Suspected Breaches of Confidence

37. Currently, the ATO and TPB cannot share protected information with the Treasury about misconduct arising out of suspected breaches of confidence by intermediaries engaging with the Commonwealth. The *Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing* (the **Draft Information Sharing Bill**) addresses this by ensuring that the ATO and TPB can share protected information with the Treasury about such misconduct (item 1, adding new item 14 to the table at subsection 355-65(8) of the TAA and item 4, adding subsection 70-40(5) to the TASA). It also enables the Treasury to on-disclose protected information to the Minister or Finance Minister in relation to a breach or suspected breach, and any proposed measure directed at dealing with such a breach (item 2, adding new section 355-181 to the TAA).
38. Disclosures are of information that concerns the breach of an obligation of confidence by a person against the Commonwealth or a Commonwealth entity, or reasonably suspected breaches, in circumstances in which the person is, or was at the time the obligation first arose, providing advice, or otherwise providing services, to a Commonwealth entity either:
 - as an entity engaged by the Commonwealth entity for that purpose; or
 - as an entity representing a taxpayer (item 1, table 14 of the table in subsection 355-65(8) of the TAA).
39. Further clarification is required as to the scope of the proposed Treasury on-disclosure powers and the protection of the information shared. Under the new regime, the Treasury will be permitted to seek legal advice about a course of action to respond to a breach, or suspected breach, or to 'consult with other agencies in relation to the work on a proposed response'.⁵ Prescribing the agencies to which

⁵ Exposure Draft Explanatory Materials, *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing*, [1.22].

protected information may be on-disclosed (perhaps by way of a regulation-making power), would assist in ensuring that confidential information is appropriately confined.

40. The relevant draft Explanatory Materials note that:

The advice provided by an entity may have been as a service provider or as a taxpayer representative and was provided by means other than public consultation. This could include but is not limited to private consultations, working groups and roundtables, where individuals were required to sign non-disclosure agreements, privacy agreements, or other such agreements with any Commonwealth department, agency and body to ensure integrity and confidentiality in the policy development process.⁶ It is possible that the Law Council may be considered to be an entity which provides advice to Government (free of charge), on behalf of the legal profession, at, for example, working groups and roundtables in the policy development process. It notes that as a matter of internal policy, the Law Council and its representatives would not sign non-disclosure agreements, although its representatives would be expected to fully respect the confidentiality of matters discussed.

41. It is unclear whether the Law Council would be considered ‘an entity representing a taxpayer’ (not a defined term), which provides advice in the circumstances envisaged. It may be unlikely that the Law Council would be considered such an entity, as its role is, for example, the national peak body for lawyers on national and international issues in furthering the betterment of law in the public interest.⁷ However, to promote certainty about the scope of the Schedule, and broader expectations regarding the range of circumstances in which an obligation of confidence may arise, it would be helpful to expressly exclude peak professional bodies such as the Law Council from the scope of these provisions.
42. Relevantly, the Law Council wrote to the Treasury earlier this year to underline its ongoing commitment to maintaining confidentiality in consultations regarding law and policy reforms.

Information Sharing with Professional Disciplinary Bodies

43. Currently, the ATO and the TPB can share protected information with a professional association in relation to suspected misconduct by members only where such disclosures relate to the administration of the taxation law (an existing disclosure exception).
44. The Draft Information Sharing Bill provides that the ATO and TPB can share protected information with prescribed disciplinary bodies, where they reasonably believe a person’s actions may constitute a breach of the prescribed disciplinary body’s code of conduct or professional standards. These changes are set out at item 1, providing for new item 15 to subsection 355-65(8) of the TAA and item 4, providing for new subsection 70-40(6) of the TASA.
45. The proposed changes would permit disclosure to a professional disciplinary body that is prescribed for such purposes via regulation.⁸

⁶ Ibid [1.13].

⁷ Constitution of Law Council of Australia Limited, Adopted on 16 April 2003, 2.1(b).

⁸ Exposure Draft, *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing*, item 1 (proposed amendment to s 355-65(8) in sch 1, item 15).

46. The disclosure would (a) concern an entity and an act or omission that the taxation officer reasonably suspects may constitute a breach of the prescribed disciplinary body's code of conduct or professional standards, however described.⁹
47. The disclosure must (b) be for the purpose of enabling or assisting the prescribed disciplinary body to perform one or more of its functions in respect of the entity.¹⁰ Broader details of other entities (name, ABN contact details, personal information) must not be disclosed, unless the Commissioner is satisfied that the inclusion of the information is necessary for the purpose mentioned in (b).¹¹
48. The changes in the Draft Information Sharing Bill appear to broadly align with the Law Council's position as set out in its media release of 6 August 2023, as follows:

The Law Council supports amendments to the tax secrecy provisions to ensure that if the Australian Tax Office or Tax Practitioners Board have concerns about the professional conduct of legal practitioners (for example, the misuse of legal professional privilege claims, or promotion of tax avoidance schemes contrary to law), those agencies will be able to raise those matters directly with state and territory legal profession regulators and have them dealt with under the comprehensive legal profession complaints and disciplinary arrangements. The Law Council also supports legal profession disciplinary referrals where a legal practitioner breaches a personal confidentiality undertaking given to the Government. These existing disciplinary arrangements, operating across eight Australian jurisdictions, are strong and effective.¹²

49. The relevant draft Explanatory Memorandum states that, prior to prescribing any professional disciplinary bodies, consideration will be given to whether the body has appropriate processes and safeguards in place to ensure any disclosed information is dealt with in a way that allows relevant disciplinary processes to occur while ensuring the protected or official information is appropriately managed.¹³
50. The Treasury Factsheet on the prescribing of disciplinary bodies envisages that the Treasury will be seeking applications from relevant professional associations to be prescribed disciplinary bodies.¹⁴ Applying bodies will be expected to provide:
 - a copy of the association's code of conduct or professional standards;
 - information regarding its disciplinary process for breaches of the code of conduct, including scope and available sanctions; and
 - information regarding how the association will ensure the appropriate treatment of any information disclosed by the ATO or TPB, including the management of privacy concerns.

⁹ Ibid, item 1 (proposed amendment to s 355-65(8) in Schedule 1, item 15(a)).

¹⁰ Ibid item 1 (proposed amendment to s 355-65(8) in Schedule 1, item 15(b)).

¹¹ Ibid item 1 (proposed amendment to s 355-65(8) in Schedule 1, item 15 (c)).

¹² Law Council of Australia, Professions must adhere to professional and ethical standards (Media Release, 6 August 2023) <<https://lawcouncil.au/media/media-releases/professions-must-adhere-to-professional-and-ethical-standards>>.

¹³ Exposure Draft Explanatory Materials, *Treasury Laws Amendment (Measures for Consultation) Bill 2023: PwC response—information sharing*, [1.26].

¹⁴ The Treasury, *Disclosure of information to prescribed disciplinary bodies* (Factsheet, 15 September 2023) 1.

51. However, the Treasury Factsheet provides that applying associations will also likely be expected to ‘have procedures in place for the reporting of significant breaches to regulatory agencies’.¹⁵ Further, this means providing a ‘commitment to providing relevant information to the ATO or the TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards’.¹⁶
52. The Law Council does not consider this an appropriate solution for legal profession disciplinary matters, which are dealt with under State and Territory legislative schemes, as well as being an aspect of the inherent jurisdiction of Supreme Courts.
53. In each State, disciplinary powers and functions are exercised by statutory bodies, while in the Territories professional associations exercise those statutory powers and functions. The specific views of legal profession regulatory bodies responsible for exercising disciplinary powers and functions should be sought on these matters before the proposals in the Treasury’s factsheet progress. However, the Law Council’s preliminary observations are that:
- Proposals that these bodies should apply to the Treasury in order to be prescribed disciplinary bodies are unusual and go beyond the Law Council’s position that tax secrecy provisions should be amended to enable complaints to be raised with state and territory legal profession regulators to enable them to be dealt with under comprehensive legal profession disciplinary arrangements. It queries why there would be a need for a regulatory body of legal practitioners to demonstrate why it is such.
 - The Law Council has particular reservations regarding the proposed requirement to provide relevant information to the ATO or the TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards.
54. As a point of reference, the Legal Profession Uniform Framework operates across Victoria, New South Wales and Western Australia. This Framework is the subject of an Intergovernmental Agreement and is made up of a Legal Profession Uniform Law; Uniform General Rules; Uniform Continuing Professional Development (**CPD**), Legal Practice, and Professional Conduct Rules for solicitors; Uniform CPD and Professional Conduct Rules for Barristers; and Uniform Admission Rules. The Framework has established a Legal Services Council, the objectives of which include ensuring the Framework remains efficient, targeted and effective, and promotes maintenance of professional standards. The Framework has also established a Commissioner for Uniform Legal Services Regulation, whose objectives include ensuring the consistent and effective implementation of the complaint and discipline provisions of the Uniform Law and supporting Rules.¹⁷
55. In the other States and the Territories legal profession legislation is largely uniform—or at least harmonised—and is made up of a Legal Profession Act (Legal Practitioners Act in South Australia), Regulations and legal profession rules dealing with professional conduct, legal practice and CPD, and Admission rules. All State and Territory legislation contains provisions for cooperation among regulatory authorities in the exercise regulatory powers and functions.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (ch 8) (*‘Legal Profession Uniform Law’*). Schedule 1 is adopted by *Legal Profession Uniform Law Application Act 2014* (NSW) s 4 and *Legal Profession Uniform Law Application Act 2022* (WA) s 6.

Disciplinary schemes

56. Every State and Territory has a statutory scheme for handling complaint and discipline matters,¹⁸ based on the same core concepts of unsatisfactory professional conduct and professional misconduct.
57. *Unsatisfactory professional conduct* is defined in legal profession legislation as including:
- ... conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.¹⁹
58. *Professional misconduct* is defined in legal profession legislation as including:
- (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.²⁰
59. The statutory schemes are the principal means by which disciplinary-related matters are raised and dealt with, although they have not replaced the inherent jurisdiction of the Supreme Courts to supervise and discipline their officers.²¹ These schemes apply to current and former Australian legal practitioners, and to current and former Australian lawyers.²²
60. The statutory schemes provide that conduct capable of constituting unsatisfactory professional conduct or professional misconduct includes conduct consisting of a contravention of professional rules.²³ The professional conduct rules for solicitors are, apart from the Northern Territory, based on the Australian Solicitors' Conduct Rules developed by the Law Council of Australia.²⁴ The professional conduct rules for barristers are developed by the Australian Bar Association.²⁵

¹⁸ *Legal Profession Uniform Law*, ch 5. See also *Legal Profession Act 2007* (Qld) ch 4; *Legal Profession Act 2006* (ACT) ch 4; *Legal Profession Act 2006* (NT) ch 4; *Legal Profession Act 2007* (Tas) ch 4; *Legal Practitioners Act 1981* (SA) pt 6.

¹⁹ *Legal Profession Uniform Law* s 296 and equivalent provisions in other State and Territory legal profession laws.

²⁰ *Legal Profession Uniform Law* s 297(1) and equivalent provisions in other State and Territory legal profession laws.

²¹ See, eg, *Legal Profession Uniform Law* s 264(1)—Jurisdiction of Supreme Courts—which provides:

- (1) The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter, and extends to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.

²² A person admitted to the legal profession is referred to as an *Australian lawyer*. An Australian lawyer who holds a current practising certificate is referred to as an *Australian legal practitioner*.

²³ See, eg, *Legal Profession Uniform Law* s 298(b) and *Legal Profession Act 2007* (Qld) s 420(1)(a).

²⁴ See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*. For the Northern Territory see *Rules of Professional Conduct and Practice*.

²⁵ See *Legal Profession Uniform Conduct (Barristers) Rules 2015*.

61. The regulatory authorities exercising disciplinary powers and functions in each State and Territory are set out below:

Uniform Law jurisdictions (Victoria, NSW and WA)

The Commissioner for Uniform Legal Services Regulation is responsible for developing and making appropriate guidelines to ensure the consistent and effective implementation of the complaint and discipline provisions in Chapter 5 of the *Legal Profession Uniform Law*. The designated local regulatory authorities responsible for handling complaint and disciplinary matters are:

Victoria	Victorian Legal Services Commissioner
New South Wales	Office of the Legal Services Commissioner
Western Australia	Legal Practice Board of Western Australia

Other jurisdictions

In the remaining jurisdictions, the local regulatory authorities responsible for handling complaint and disciplinary matters are:

Queensland	Legal Services Commissioner
Australian Capital Territory	Law Society Council and Bar Association Council
Northern Territory	Law Society Northern Territory
South Australia	Legal Profession Conduct Commissioner
Tasmania	Legal Profession Board of Tasmania

Information protection and disclosure

62. As mentioned above, Treasury proposes that a professional association applying to become a prescribed disciplinary body will likely be expected to commit to providing relevant information to the ATO or TPB in relation to circumstances where relevant practitioners may have been involved in significant breaches of Commonwealth laws or other ethics standards.
63. The Law Council considers that such a commitment would be inappropriate for the legal profession regulated under State and Territory laws. Accordingly, the Law Council recommends Treasury consult with the States and Territories (including the Legal Services Council) on matters relating to information protection and disclosure under the legal profession laws.

Conclusion

64. The Law Council is grateful for the opportunity to respond to Treasury in relation to its proposed measures as set out above. It would be happy to meet with Treasury to discuss the matters raised in this submission, should this further assist.