31 May 2024

Nadja Harris
Senior Policy and Legislation Adviser
Tax Practitioners Board
GPO Box 1620
Sydney NSW 2001

By email: tpbsubmissions@tpb.gov.au

Dear Ms Harris,

Draft TPB(I) D53/2024 – Breach reporting under the *Tax Agent Services Act 2009*

The Australian Bookkeepers Association, Chartered Accountants Australia and New Zealand, CPA Australia, the Institute of Public Accountants, the Institute of Certified Bookkeepers, the NTAA Plus, the Taxation Committee of the Business Law Section of the Law Council of Australia, the SMSF Association, and The Tax Institute (together, **the Joint Bodies**) write to you as members of the Tax Practitioners Governance and Standards Forum (**GSF**) and Consultative Forum (**CF**). The Joint Bodies are the peak professional accounting and tax practitioner bodies in Australia representing the tax profession, the superannuation sector, and financial advisers. We welcome the opportunity to make a submission to the Tax Practitioners Board (**TPB**) in respect of its consultation on the following draft guidance materials (collectively, the **draft guidance**) relating to the breach reporting obligations under the *Tax Agent Services Act 2009* (Cth) (**TASA**):

- draft TPB Information Sheet TPB(I) D53/2024 breach reporting under the Tax Agent Services Act 2009 (**the draft Information Sheet**);
- draft summary of breach reporting obligations; and
- draft high-level flowchart and decision tree on breach reporting.

The draft Information Sheet summarises the new TASA breach reporting requirements in section 30-35 (new paragraphs (ba)) of the TASA and new section 30-40 for registered tax agents and BAS agents, collectively referred to by the TPB as **registered tax practitioners** (**practitioners**). The new breach reporting rules apply to breaches that occur on or after 1 July 2024 and were given legislative effect by the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023* (Cth) (**TLAA1 2023**).

The Joint Bodies recognise the intent of introducing new breach reporting requirements which are expected to enhance the quality of tax practitioner services, strengthen client protection, and instil greater trust in the integrity of the tax system. However, the Joint Bodies reiterate our concerns over the lack of proper consultation, particularly in relation to the amendments introduced by the Australian Greens to Part 5 of Schedule 3 to the Treasury Laws Amendment (2023 Measures No. 1) Bill 2023. Those amendments were not subject to the usual process of public consultation and were tabled without an accompanying explanatory memorandum. This has resulted in vaguely expressed law that imposes a significant compliance burden on practitioners and will be challenging to apply and regulate in practice. We also acknowledge that the vaguely expressed law has made the task of the TPB as the regulator to practically implement and administer the law a challenging exercise.

The draft Information Sheet attempts to provide guidance on the vaguely expressed law. However, in our view, it falls short of being practically useful to practitioners in determining their reporting obligations. This is due, in part, to the extensive use of undefined terms in the legislation (which accordingly take their ordinary meaning), and the nature of the reporting requirements that depend on the facts and circumstances of each case.

Our key observations and recommendations to improve the draft guidance as a matter of high priority are summarised as follows:

- The draft Information Sheet requires further interpretive guidance on the new breach reporting requirements and further relevant case studies to be practically useful for practitioners.
- The draft Information Sheet should make it clear, to allay any confusion among practitioners, that the intent of the practitioner is irrelevant in determining whether there has been a significant breach of the Code of Professional Conduct in section 30-10 of the TASA (**Code**).
- The definition of 'significant breach of the Code' involves a complex analysis based on evidence and legal concepts. The term 'otherwise significant' lacks a specific definition. Likewise, 'material loss or damage' requires an assessment and the exercise of judgment on materiality. The term 'reasonable grounds to believe' similarly requires an objective assessment of the facts and circumstances. Practitioners may not have sufficient information or skills to make such assessments. While the draft Information Sheet acknowledges this limitation, it should provide practical guidance on how to address it.
- The draft Information Sheet and case studies should make it clear who has the reporting obligation. When a company or partnership is registered as well as a sufficient number of registered individuals, it is unclear whether the individual, the entity, or both, should be reporting. Further, the guidance should clarify whether self-reporting or peer-reporting applies in cases where there are multiple individuals and associated entities involved.
- The draft Information Sheet outlines varying degrees of evidentiary requirements that may result in confusion and practical challenges for practitioners. The draft guidance should provide a clearer and more concise framework for practitioners to follow that consolidates the evidentiary requirements throughout the guidance and better explains how the varying requirements should be met. For example, paragraph 34 provides that a practitioner's basis for their belief must be supported by appropriate facts and evidence and be able to be appropriately substantiated, but it is not clear what 'appropriately substantiate' without needing to have conclusive proof, means. Further, paragraph 107 refers to evidence, verification or corroboration so it would be useful to clarify how this interacts with the guidance in paragraph 34.
- The draft Information Sheet should provide further guidance on the following:
    - the repercussions of frivolous, vexatious or malicious complaints;
    - the repercussions of failing to comply with reporting obligations by the due date;
    - whistleblower protection for unrelated practitioners;
    - consequences and resolution of cases where a practitioner disagrees with the TPB's position on being required to report a breach; and

- the action to be taken by a recognised professional association (**RPA**) upon receiving notification from a practitioner about a significant breach of the Code by another practitioner who is a member of that RPA, beyond their existing oversight, disciplinary and professional conduct processes.

Our further recommended improvements to the draft guidance include:

- to avoid superfluous claims, establishing an ethics officer or hotline for practitioners to seek guidance on ethical dilemmas and their obligations under the TASA, preferably on an anonymous basis;
- providing further examples to better explain the concepts of 'significant breach of the Code' and 'otherwise significant';
- providing further case studies on specific practical circumstances dealing with the application of the breach reporting requirements insofar as they affect the supervision and control of employees, staff training etc.; and
- providing clearer guidelines on the consequences and the TPB's approach in cases where a practitioner disagrees with the TPB's decision, including any decision review process.

Our detailed response and recommendations to further improve the draft guidance are contained in **Appendix A**.

The Joint Bodies would be pleased to offer our assistance to the TPB and work collaboratively on developing further case studies to better assist practitioners. We have many practical examples based on our collective experiences that we can share with you.

We look forward to engaging with you further in the next stage of this consultation process.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Counsel – Tax & Legal, Julie Abdalla, at (02) 8223 0058.

Yours faithfully,

AUSTRALIAN BOOKKEEPERS ASSOCIATION

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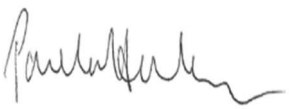

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APPENDIX A

We have set out below our detailed comments and observations in relation to the draft guidance for your consideration.

Overview

We have divided this submission into three key themes arising based on the clarity required in the draft guidance:

1. matters that require further interpretive guidance;
2. process-related matters; and
3. matters that require a policy change.

1. Matters that require further interpretive guidance

Our overarching observation is that the draft Information Sheet comprises mostly theoretical content which will be difficult for practitioners to apply in practice. Further practical interpretive guidance is needed to enable practitioners to better understand and comply with their breach reporting obligations.

We understand that the Australian Securities and Investments Commission's (**ASIC**) approach in its guidance and compliance work provides a useful model for how to administer breach reporting provisions. ASIC's approach provides some relevant insights and experience gained by ASIC in the course of administering the breach reporting provisions that apply to the financial services industry. This can serve as instructive and helpful lessons for the TPB.

'Significant breach of the Code'

The subjective definition of the term 'significant breach of the Code' requires the reporting practitioner to undertake a complex analysis based on evidence and factors listed in paragraph 90-1(1)(c) of the TASA and an understanding of legal concepts, including those contained in criminal laws, such as 'indictable offences' and 'an offence involving dishonesty', across various Australian jurisdictions. This is not a simple process that can be easily undertaken by a practitioner, if at all.

Practitioners will be required to acquire knowledge of criminal laws, including but not limited to fraud, theft, money laundering, bribery, corruption, embezzlement, dealing with proceeds of crime, dishonest use of position, making false or misleading statements, cyber-crimes, and unlawfully obtaining or disclosing information. This kind of knowledge is far beyond what may be reasonably expected of most practitioners. Further, to fulfil the breach reporting obligations, they are also expected to understand the nature of other indictable offences that may not be as obvious as these examples, at a Commonwealth level as well as in State and Territory jurisdictions. It is not clear how the TPB expects practitioners to develop the understanding of criminal laws that will be necessary within a short period (i.e. within 30 days of a reportable breach from 1 July 2024) over and above their new TASA obligations, noting there is no discretion in the law for the TPB to extend the 30-day period in any circumstances.

While the TPB has acknowledged the limitations of practitioners in understanding legal concepts and criminal laws, the concern has not been addressed in the draft guidance and there is no practical guidance in the draft Information Sheet beyond suggesting that practitioners seek legal advice. The process of seeking legal advice on what constitutes an 'indictable offence' or 'an offence involving dishonesty' will likely take more than 30 days to complete, having regard to the need for the lawyer to understand the particular facts and circumstances of the practitioner seeking the advice. Moreover, this is likely to be a costly exercise. This will cause the practitioner to incur additional costs, regardless of whether the conduct is found to merit reporting.

Although a significant breach of the Code can be assessed only on a case-by-case basis, the Joint Bodies are of the view that providing further examples of significant breaches would help practitioners gain a better understanding, at least of some more relevant, realistic, marginal or debatable circumstances. For example, sharing confidential information or misappropriating clients' funds would constitute a significant breach, whereas mistakenly recording a CPE event twice which increases CPE points may not be a significant breach. It would be helpful if the draft Information Sheet could include examples that concern:

- acquiring a new client from another practitioner in circumstances that illustrate there are and are not reasonable grounds to believe that the former agent has breached the Code and that the breach is significant;
- losing a client to another practitioner in circumstances that illustrate there are and are not reasonable grounds to believe that the new agent has breached the Code and that the breach is significant; and
- acquiring credible evidence and not merely gossip, such as the situation illustrated by case study 5 where 'Chatham House rules' apply.

'Material loss or damage'

The Joint Bodies are of the view that a more precise definition of 'material loss or damage' is required. The subjectivity of what is considered 'material' necessitates establishing a specific monetary threshold. While a specific threshold would be ideal, the draft guidance should be flexible to recognise circumstances that fall below the threshold yet remain significant. This approach would ensure the general application of the threshold while providing some leeway for exceptional cases.

In a recent TPB webinar[1], it was highlighted that an unresolved $1 million Division 7A loan issue would be deemed material, while a minor work-related deduction error of a few thousand dollars would not. Concrete examples like these are essential for tax agents to have as reference points.

[1] Peter de Cure and Elinor Kasapidis, 'Breach reporting' (Webinar, Tax Practitioners Board, 14 May 2024)

Also, the concept of reputational damage being a reportable issue may be challenging for practitioners. This is because determining what constitutes reputational harm is highly subjective and open to interpretation. Different individuals may have varying opinions on what actions or events could potentially damage a person or organisation's reputation. For example, one person may consider that a minor mistake or error in judgment could lead to reputational damage, while another person may argue that such incidents are trivial and would not have a significant impact on one's reputation. This subjectivity makes it challenging for practitioners to accurately assess and report on reputational damage. To address this issue, it is recommended that the TPB provide practical and viable examples of actions that practitioners can adopt to effectively identify and address minor violations. By offering specific and tangible examples, practitioners can have a clearer understanding of what actions they should take to mitigate any potential reputational harm.

'Otherwise significant'

Like many terms in these provisions, the term 'otherwise significant' is not defined in the TASA, so the draft Information Sheet advises that this term takes its ordinary meaning. The draft Information Sheet recognises that determining whether a breach of the Code qualifies as 'otherwise significant' is a factual inquiry that must be made on a case-by-case basis, taking into account the surrounding circumstances. It further acknowledges that not every breach of a specific Code provision will automatically be deemed 'otherwise significant'. The draft Information Sheet would benefit from including practical examples of when a breach would meet these criteria.

'Ought to have'

Paragraphs 117 and 118 of the draft guidance explain that the meaning of the phrase 'ought to have' requires an objective approach but this is open to interpretation and may give rise to uncertainties and inconsistencies in identifying and reporting breaches. To address this issue, the Joint Bodies recommend establishing explicit and objective criteria, along with illustrative examples, to assist practitioners in determining when a practitioner 'ought to have' reasonable grounds that they, or another practitioner, has breached the Code and that breach is significant.

'Reasonable grounds to believe'

'Reasonable grounds to believe' is not defined in the TASA and similarly takes its ordinary meaning. The draft Information Sheet provides some guidance on the ordinary meaning of the term, considering the purpose of the provision and its statutory context. Determining whether a practitioner has 'reasonable grounds to believe' will require an analysis of the surrounding circumstances and a consideration of various factors. The draft Information Sheet notes that the concept has been used in criminal jurisdictions, although this is likely to be unfamiliar to practitioners. When determining if a breach has occurred, and if so, whether it is a significant breach, an objective assessment of the facts and circumstances of the case is required to be conducted. In this regard, additional guidance in the form of a non-exhaustive list of scenarios would benefit practitioners.

Interaction of breach reporting with the obligation not to make false and misleading statements to the Commissioner or the TPB

The tax law imposes an obligation on taxpayers and practitioners not to make false and misleading statements when lodging returns and statements. Where a practitioner considers that the taxpayer has a reasonably arguable position (**RAP**) on a tax position but the Commissioner issues an 'ATO Penalty Position Paper' that specifically claims and alleges that the return makes a false and misleading statement to the Commissioner, it is unclear whether the TPB would treat this as conclusive or at least sufficient evidence of a breach of the Code item by the practitioner. If so, it is unclear whether the practitioner is under an obligation to self-report to the TPB based on the issue of such a paper by the ATO when it is received by the client or the practitioner.

The intent of the registered tax practitioner is not relevant to the breach reporting requirement

The draft guidance does not provide a clear statement that the practitioner's intent or lack of intent to breach the Code is irrelevant to the breach reporting requirements (other than for determining the occurrence of an offence involving dishonesty). The reporting obligations are based on whether there are reasonable grounds to believe a practitioner has breached the Code and whether that breach is significant (**reportable breach**). Under the law, the subjective intent of the practitioner is not a consideration when determining whether a practitioner is required to self-report or report another practitioner. The effect of the law is that it does not matter whether the practitioner's conduct is intentional, reckless, involves a lack of care or is unwittingly undertaken, in determining whether a breach must be reported.

This lack of clarity in the draft guidance may create confusion, which could hinder practitioners from fully understanding and complying with their obligations in reporting reportable breaches. By explicitly stating that a practitioner's intent is irrelevant when it comes to breach reporting, practitioners will have a clearer understanding that their, or another practitioner's, actions or lack thereof, regardless of intent, must be reported if they meet the criteria for a reportable breach.

The Joint Bodies recommend that this issue be explicitly addressed in the draft Information Sheet to improve the guidance and ensure practitioners have a more comprehensive understanding of their breach reporting obligations.

Varying degrees of analysis and evidentiary requirements

The draft Information Sheet outlines varying degrees of evidence that practitioners must provide to support their claims, which may lead to confusion among practitioners in meeting their breach reporting obligations. While the draft Information Sheet advises that conclusive proof is not necessary, practitioners are expected to have a strong foundation for their beliefs (paragraph 31) supported by evidence such as personal experience, publicly available information, client complaints, or professional advice (paragraphs 50 and 104) to support their belief.

It is clear that hearsay, gossip or third-party opinions without further investigation will not meet the standard of having 'reasonable grounds' for the belief. However, further guidance on the extent of evidence and substantiation required by a reporting practitioner would be useful.

The suggestion to seek legal advice will not be practical or necessarily conclusive, in many cases. There can be significant costs involved in seeking legal advice and practitioners should not be put in a position where this is a first port of call due to insufficient guidance. Due to limited resources, smaller tax practices may struggle to locate a suitably qualified legal practitioner or afford their services. Further, obtaining a legal counsel's opinion and filing a breach report within the 30-day reporting timeframe is unlikely to be feasible given the time-consuming nature of the task and the complexity of the factors at play. To support practitioners, the TPB should create a dedicated section on its website to offer guidance and direct them to resources for such services.

The draft Information Sheet sets out an expectation that practitioners are to assess the significance of any loss or damage from the perspective of a reasonable person with the expertise and experience of a practitioner. This evaluation is subjective and relies on the practitioner's professional judgment, considering the specific circumstances and any relevant information about the breach. However, it fails to acknowledge that practitioners may not always have sufficient information to accurately determine the materiality of the breach. Further, factors such as the number and complexity of the issues involved must also be taken into account. It is possible that the practitioner is aware of only one potential violation and does not have information about any other reportable breaches or incidents that together may constitute a reportable breach.

The draft Information Sheet encourages practitioners in paragraphs 87, 89, 99 and 111 to notify the TPB, if they are uncertain about the significance of a breach but have reasonable doubt, despite the absence of solid evidence. It is expected that this will result in some complaints being filed unnecessarily through over-reporting as a precautionary measure by practitioners to avoid penalties for failing to report breaches. This could exponentially increase the number of complaints the TPB may receive and raises the issue of how the TPB intends to manage that workload with its limited resources.

2. Matters that require process-related guidance

Interaction of self-reporting and reporting another practitioner

As discussed above, the draft guidance does not explain the interaction of the self-reporting obligation under paragraphs 30-35(1)(ba), 30-35(2)(ba) and 30-35(3)(ba) of the TASA with the obligation to report another practitioner under section 30-40 of the TASA. We regard the two sets of provisions as operating largely independently of each other. This means that even if a practitioner self-reports a breach, another practitioner is still required to report the reportable breach (if they have reasonable grounds etc.) or otherwise may face penalties for failing to report that practitioner. However, potential interdependencies are identified by the TPB's draft guidance where it indicates at paragraph 141 that a practitioner will not be subject to compliance action from the TPB if they fail to report a breach if they are aware that the breach has already been reported.

The Joint Bodies are of the view that the interaction of the two sets of breach reporting provisions should be clearly explained in the draft Information Sheet to better guide practitioners. A process-related flowchart illustrating this interaction would be helpful.

Further, there is uncertainty among tax practitioners about which entity has the obligation to report where there is a registered company or partnership and there is a sufficient number of registered individuals. The examples in the draft guidance only add to the uncertainty as they seem to create ambiguity, rather than providing clarity.

For example:

- In **Case Study 1** – David, the individual tax agent, seems to have the obligation to report his own company, but it could be construed as self-reporting as David is the sole director of the company. The guidance should clarify whether section 30-35(ba) or section 30-40 of the TASA applies where two registered agents are a registered company or partnership and a related individual. We further consider that the breaches of the Code in Case Study 1 would not seem to be egregious. We are concerned the TPB appears to be taking an overly expansive view of the meaning of 'significant breach' in the draft guidance and that the law could be interpreted too widely. In our view, the TPB should take a narrower interpretation than what is suggested in the guidance, consistent with the policy intent[2].
- In **Case Study 2** – Ivan, the individual tax agent has an obligation to notify the TPB of his breach as an individual tax agent. However, the example does not make it clear whether Ivan also needs to report a breach by his company, and whether the company must also self-report the breach.
- In **Case Study 4** – Colin, the individual tax agent, has an obligation to self-report the breach. However, as he is employed by a medium-sized accounting firm, it is unclear whether the tax agent company/partnership also has an obligation to report the breach by Colin once it becomes aware of the breach.

The above examples and queries demonstrate the extent of uncertainty and the inherent duplication that arises in applying these rules in practice. The guidance should clarify this issue and seek to streamline the requirements so compliance with the obligations is as simple and cost-effective as possible.

Notably, the respective fines and the potential imprisonment term applicable for an offence of failing to comply with the breach reporting obligations differ depending on whether the entity that commits the offence is an individual or a corporation. Therefore, this is another factor that illustrates the importance of the guidance being very clear about who has the reporting obligation.

The Joint Bodies understand that under the law as enacted, a practitioner is under no obligation to engage in communication with the other practitioner who is the subject of the reportable breach to gain a comprehensive understanding of the situation or to provide any notice prior to reporting a reportable breach to the TPB or an RPA. To require otherwise would, in our view, inappropriately push practitioners further into a model where they are responsible for regulating each other.

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[2] See pages 19 and 20 of the Proof Committee Hansard of the Parliamentary Joint Committee on Corporations and Financial Services, Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry, 8 May 2024.

In particular, these remarks made by Senator Barbara Pocock indicate that the policy intent was to target egregious behaviour and serious ethical misconduct where there were '… very clear examples of behaviour that none of us think was ethical…

'I want to be really clear. It's really important that we don't beat up a non-existent unintended consequence. It is not the intention here to make every accountant nervous about every other accountant. It is about dealing with a really big problem where the pendulum has swung too far away from ethical practice and calling it out.'

Frivolous, vexatious or malicious reports

The draft guidance provides some guidance on how the TPB will deal with frivolous, vexatious or malicious reports made by practitioners. Case Study 6 briefly touches on this issue, however, it fails to adequately set out the consequences for a practitioner who makes a vexatious claim against another practitioner, including potential irreversible reputational damage. The draft Information Sheet notes that if a practitioner makes false allegations against another practitioner, they may violate their own obligations under paragraph 20-5(1)(a) of the TASA (about being a fit and proper person to be eligible for registration) and could face sanctions. The Joint Bodies considers that more detailed guidance on this matter is crucial, including clearly defining the circumstances in which a claim against a practitioner may be considered frivolous, vexatious or malicious.

We also consider that a risk assessment process should be undertaken before any formal investigations proceed as this could help filter out baseless claims and assess the credibility of the practitioner reporting the breach. This process should be clearly laid out in the draft Information Sheet.

30-day timeframe for reporting

The draft guidance states that any reportable breaches of the Code must be reported to the TPB and relevant RPA (where applicable) in writing within 30 days from the time the practitioner becomes aware or has reasonable grounds to believe that a breach, whether by themselves or another practitioner, has occurred, and the breach is significant. However, the draft Information Sheet does not contemplate the repercussions of a practitioner reporting beyond the 30-day timeframe.

The Joint Bodies are of the view that the draft Information Sheet should address this issue, including any special circumstances that may be taken into consideration in determining the outcome. In addition, the TPB should improve the notification process by developing a user-friendly online portal that integrates reporting to both the TPB and relevant RPAs, effectively reducing administrative burdens and enhancing efficiency. The TPB may need to work closely with RPAs to streamline this process.

We further note that, practically speaking, reporting will be extremely challenging due to the rolling 30-day period, rendering it nearly impossible for practitioners to keep track of and fulfil their reporting obligations in what will essentially be a daily obligation to consider any possible breaches by themselves or other practitioners within the preceding 29 days.

The Joint Bodies consider that the 30-day reporting period — which is taken to start on the date on which the practitioner has, or ought to have, reasonable grounds that a breach has occurred and that it was a significant breach — is subjective and difficult to accurately measure. We suggest the TPB should provide practical guidance on when the practitioner is taken to have formed those reasonable grounds and therefore when the 30-day period commences.

Processes to support practitioners

We consider the TPB should establish dedicated resources in the form of an ethics officer or confidential hotline for practitioners to seek guidance and clarification on ethical matters they encounter in their professional practice before making a report. For example, the New South Wales Law Society offers a confidential ethics hotline. Such resources would enable practitioners to discuss their concerns confidentially and receive expert advice on how to navigate complex ethical dilemmas. This proactive approach would not only help practitioners make informed decisions on ethical conduct but also contribute to preventing potential breaches of the Code. By providing practitioners with a dedicated resource to address their ethical dilemmas, the TPB would demonstrate its commitment to upholding professional standards, promoting ethical behaviour within the tax profession and supporting practitioners as they come to terms with their new reporting obligations. This proactive measure would also contribute to the overall integrity and reputation of the tax profession.

When a registered tax practitioner genuinely believes there is no valid reason to report a breach

The Joint Bodies are of the view that where a practitioner believes they have a valid reason or reasonable grounds to not report a significant breach, and later finds themselves in disagreement with the TPB, the draft Information Sheet does not provide any guidance on the potential consequences for the practitioner or the TPB's approach in such cases. In light of this, we recommend that alternative sanctions such as education or a warning should be considered in these situations, in preference to seeking an order from the Federal Court to impose civil penalties.

We consider that seeking an order to impose civil penalties could be an overreach, unfair and disproportionate in circumstances where the practitioner reasonably considered that they did not have a reporting obligation. A more balanced and measured approach should be adopted, taking into account the specific circumstances of each case. By considering alternative measures such as education or a warning, the TPB can provide an opportunity for practitioners to rectify any misunderstandings or mistakes they may have made. This approach would promote a culture of learning and improvement within the tax profession.

Further, the Joint Bodies are of the view that the TPB should provide clearer guidelines on the consequences and its approach in cases where a practitioner disagrees with a decision of the TPB. In particular, guidance on any review or appeal process available to practitioners would be useful. This would help ensure transparency and fairness in the regulatory process.

Action required by Recognised Professional Associations

Part 5 of Schedule 3 to the TLAA1 2023 introduced new section 30-40 of the TASA. Subsection 30-40(2) mandates that practitioners report reportable breaches of the Code by another practitioner to the TPB in writing. Additionally, if the reporting practitioner is aware the other practitioner is a member of an RPA, they must also notify that RPA of the reportable breach. Paragraph 129 of the draft guidance requires practitioners to make additional enquiries including with the relevant RPA, to confirm membership. The current requirement implies that registered practitioners must contact multiple RPAs to ascertain membership, which can be time-consuming and hindered by privacy restrictions limiting the RPA from answering certain questions regarding their members. This implies that the reporting practitioner should have knowledge of all the RPA memberships that are relevant, which in practice raises the risk of the reporting practitioner missing a particular RPA that may need to be notified. A more efficient approach would be to maintain updated practitioners' RPA membership details with the TPB, accessible through the public register, to streamline the process for other practitioners to verify and notify RPAs as required.

While we note practitioners have an additional obligation to notify the RPA in the event of a reportable breach by another practitioner (without a similar reporting obligation for self-breaches), it is uncertain what actions or responsibilities the RPA is expected to take or has upon receiving such a notification.

Clarification from the TPB on this issue would be useful. This may require separate consultation with RPAs.

Review drafting of wording in Case Studies

The following case studies require additional information for the practitioners to understand the obligations better.

Case Study 4: The Joint Bodies are unclear as to whether the client is and remains a former client, or has again become a current client. The initial paragraphs seem to suggest that the client is a former client. However, the last paragraph on page 32 suggests that the practitioner accesses information that they would only be entitled to access if they were the taxpayer's agent. We suggest this be clarified.

Case Study 6: The heading of the case study concludes that the report was a 'vexatious unsupported claim', however, the body of the text does not conclude this. The example states that the competitor and taking over of the client are circumstances that may increase the potential for it to be regarded as vexatious. We suggest that this inconsistency should be addressed in finalising the draft guidance.

Interaction with NOCLAR in Accountants' Code of Ethics

Professional Accountants (**PAs**) are subject to the Non-compliance with Laws and Regulations (**NOCLAR**) standard in the Code of Ethics (APES 110)[3], which has applied since 1 January 2018.

[3] APES 110 *Code of Ethics for Professional Accountants (including Independence Standards)* is based on the International Code of Ethics for Professional Accountants (Including International Independence Standards) issued by the International Ethics Standards Board for Accountants (**IESBA**).

NOCLAR provides a framework for all PAs on how best to act in the public interest when they become aware of non-compliance or suspected non-compliance with laws and regulations by clients or employing organisations. The relevant laws and regulations are those that:

- have a direct effect on the determination of material amounts and disclosures in the financial statements; or
- may be fundamental to the entity's operations or business, or where non-compliance may lead to material penalties.

NOCLAR empowers PAs to depart from the principle of confidentiality and report NOCLAR to an appropriate authority if that is in the public interest. It permits the NOCLAR reporting, but it is not mandatory, unlike the breach reporting rules which impose obligations on tax agents to report.

PAs must comply with the relevant NOCLAR requirements and consider whether disclosure to an appropriate authority is the right course of action in the circumstances. If a PA determines that disclosure of NOCLAR to an appropriate authority is the right course of action in the circumstances, then such a disclosure will not be considered a breach of confidentiality.

Section 260 of the Code of Ethics sets out the NOCLAR standard and provides useful views and insights for the TPB.

Paragraph 260.20 A2 provides illustrative examples of matters, according to APESB, that a PA might determine should be reported to an appropriate authority, for example:

- The employing organisation is engaged in bribery (for example, of local or foreign government officials for purposes of securing large contracts).
- The employing organisation is regulated and the matter is of such significance as to threaten its license to operate.
- The employing organisation is listed on a securities exchange and the matter might result in adverse consequences to the fair and orderly market in the employing organisation's securities or pose a systemic risk to the financial markets.
- The employing organisation is promoting a scheme to its clients to assist them in evading taxes.

External factors also relevant in the determination include:

- Whether there exists robust and credible protection from civil, criminal or professional liability or retaliation afforded by legislation or regulation, such as under whistleblowing legislation or regulation.
- Whether there are actual or potential threats to the physical safety of the PA or other individuals.

To summarise, these matters of non-compliance that might merit reporting are serious, significant, cause actual or potential substantial harm, or are egregious, unlawful or illegal acts, such as tax avoidance/evasion promotion, harm to the public health or safety, and risk to financial systems or markets. Countervailing factors that are able to be taken into account include factors going to the health and safety of the reporting individual, and whether they are safeguarded from legal liability or professional retaliation under whistleblower protections.

The Joint Bodies recommend that the TPB consider how these broad principles and the approach regarding significance and materiality could potentially be adopted or reflected by the TPB in administering the breach reporting rules.

Operation of breach reporting requirements in other scenarios

The Joint Bodies are of the view that including further case studies and sections within the draft Information sheet would be beneficial to explain how breach reporting operates in the context of discussion groups, supervision and control of employees, professional associations and staff training.

Case Study 5 considers a scenario involving a practitioner attending a monthly discussion group, however, the fact pattern is based on the practitioner overhearing the 'gossip' of two attendees about a mutual acquaintance. Further examples covering a range of conceivable scenarios would be useful.

Practitioners attend discussion groups and similar gatherings of practitioners to share insights, seek guidance and develop their professional skills and knowledge. Similarly, technical staff training is not only an important element of supporting and supervising staff within a practice; it is mandated by the TPB and various professional associations (through their by-laws) in the form of continuing professional education (**CPE**). Staff training is often delivered by practitioners within the firm or outsourced to external tax trainers who may themselves be practitioners.

The draft Information Sheet should more clearly explain the reporting obligations of practitioners who come into information suggesting a reportable breach has occurred, through attending discussion groups, supervising employees, providing services to members by professional associations and providing staff training.

In addition, including case studies in the guidance that cover various scenarios of incorrect tax treatment identified by the ATO, such as Division 7A, capital allowance deductions, valuation of depreciable assets, FBT issues related to the private use of business assets, work-related expenses and compliance with trust distribution requirements etc., would offer valuable assistance to practitioners in understanding the extent to which they need to assess these matters to ensure the tax law was previously correctly applied to their clients' circumstances. Practitioners are not required to audit their clients' information, but inherent risks will arise in this situation from a breach reporting perspective. This is particularly relevant to and common for practitioners when they take over the tax affairs of a client from another practitioner. In particular, software containing crucial historical data pertaining to a client used by one practitioner may not be accessible to another practitioner. It may be therefore difficult for practitioners to determine in some circumstances whether the law has been correctly applied by another practitioner.

Legal professional privilege

Legal professional privilege (**LPP**), also known as client legal privilege, is a fundamental principle in the legal system that protects the confidentiality of communications between a client and their legal adviser. It is vital to ensuring that our justice system operates fairly. Importantly, this privilege belongs to the client, not the lawyer, and can only be waived by the client. This means that the lawyer is obligated to keep confidential all communications and information shared by the client unless the client explicitly consents to disclosure. This privilege is crucial in fostering trust and open communication between clients and their lawyers, allowing clients to freely discuss their legal matters without fear of their information being disclosed to others and unfairly jeopardising their position.

While paragraph 151 of the draft Information Sheet adequately summarises LPP, paragraph 152 misleadingly implies that practitioners can waive LPP. Only the client can waive LPP. Accordingly, we suggest the second line of that paragraph should be amended to read as follows:

> As such, registered tax practitioners should consider whether LPP applies before providing information to the TPB, and applicable RPA (where relevant), and if so, have a duty to consult their client as to whether the client wishes to waive their right to LPP in order to provide the information to the TPB and RPA. In contacting the client in relation to waiver, registered tax practitioners should advise the client that they should consult with their legal practitioner before agreeing to any waiver. Under no circumstances may the registered tax practitioner waive the client's LPP without the express consent of the client (which should preferably be in writing).

Transitional implementation period

Given these rules were legislated without accompanying guidance, the Ministerial Instrument that expands the Code is yet to be finalised and registered, and the TPB's guidance is understandably still being developed and finalised, we suggest the TPB should take a transitional approach within the first 12 months of the commencement date of these rules. The TPB's efforts during this period should be focused on educating practitioners and increasing awareness for those practitioners who are taking reasonable steps to understand and comply with their new reporting obligations.

Separate online forms to report breaches

The Joint Bodies consider that the existing forms for 'Notifying a change of circumstances' (self-reporting) or making a Complaint (reporting another practitioner) are not appropriate for the purposes of reporting reportable breaches, even if they are adapted by adding boxes or questions relevant to these respective breach reports. Such dual-purpose adaptation would likely lead to confusion in our view.

We consider there should be a separate and distinct form and webpage created for each of the two types of breach reporting. In particular, the act of reporting a breach by another practitioner is not a 'complaint', whether it is made to the TPB or an RPA. The Complaints webpage and form are not appropriate when reporting a breach by another practitioner because the current Complaints webpage makes the following statements, among others, that are not relevant in the context of a practitioner who is required to discharge their breach reporting obligation:

- 'We encourage you to discuss your complaint directly with the tax practitioner if appropriate, before lodging a complaint with us.'

- ‘Please search the TPB Register of registered and deregistered tax practitioners, to identify the entity or person who you engaged for tax services or paid a fee to.’
- ‘Subject to your election or objection to remain anonymous below, we may provide a copy of your complaint to the tax practitioner you are complaining about and ask them to respond to your complaint.’

Unlike complaints where there is no obligation on any party to make one in any circumstances, breach reporting carries significant and serious consequences for failing to comply with the reporting obligation. Depending on the number of offences arising from a practitioner’s failure to report a breach when required to do so, the consequences can result in criminal prosecution and conviction, including a period of incarceration for up to a year. The draft guidance sets out these consequences at paragraphs 157-160.

Due to the seriousness of a failure to comply with the breach reporting obligations, the instructions on the forms must be clear, concise and precise, so that they facilitate and promote compliance with the reporting obligations.

We also note that the ‘Notify a change in circumstances’ form that is proposed to be used for self-reporting does not yet appear in the list under the tab for ‘Forms’ on the TPB’s website.

This point is also directly relevant to the issue we have raised above regarding the unsuitability of the existing online forms, in particular, the Complaints form, which recommends contacting the other practitioner in the first instance. For this reason, we suggest that distinct, customised breach reporting forms with clear, concise and relevant instructions should be developed and implemented.

3. Matters that require a policy change

While we acknowledge that legislative change is beyond the TPB’s scope and jurisdiction, there is a serious need for legislative amendments to improve the operation of the breach reporting obligations. We will be raising these matters separately with the Minister but in the interests of transparency have set out below our key concerns.

Proposed start date

The Joint Bodies strongly consider that the commencement date for the breach reporting obligations should be postponed by a minimum of six months. This is due to the absence of adequate consultation and guidance before the enactment of the TLAA1 2023. Such a delay would provide practitioners with somewhat more reasonable time to better understand, adapt to and adequately prepare for the upcoming changes.

Timeframe for reporting a breach

The 30-day reporting period will be challenging for practitioners to gather evidence such as personal experience, publicly available information, client complaints, or professional advice, due to their workload and maintaining their professional practice, client commitments, and the need to stay up-to-date with their CPE requirements. To address this, it would be in our view more reasonable if the timeframe were extended to at least three (3) months. This will give practitioners a more realistic period of time to collect sufficient evidence, ensuring that reportable breaches are appropriately substantiated. This approach would likely minimise unnecessary reporting of breaches that are not significant.

Reporting another practitioner to their RPA

The Joint Bodies consider that, as a matter of policy, the TPB should have the obligation to notify a practitioner's RPA once they receive a breach report in respect of that practitioner. This obligation should not be imposed on the reporting practitioner to identify the relevant association of which the other practitioner is a member and then notify the RPA. In our view, the TPB is best placed to undertake this notification function.

We also do not see the policy rationale for a practitioner having to notify an RPA about the breach of another practitioner who is a member of that RPA, but not having to self-report to their own RPA of their own significant breach. We consider the policy settings should create a system that is optimised as much as possible and designed to enable compliance, in accordance with natural systems.

Lack of whistleblower protection for unrelated practitioners

The draft guidance does not address the application of the whistleblower protection rules in Part IVD of the *Taxation Administration Act 1953* (Cth) (**TAA**) in relation to the breach reporting rules. The Joint Bodies consider that the guidance should explain:

- the relationship between the whistleblower protection rules and the breach reporting rules; and
- whether the two sets of rules function independently of one another, or in circumstances in which a reporting practitioner under the breach reporting rules can be considered an 'eligible whistleblower' under the definition in section 14ZZU of the TAA.

Feedback from practitioners indicates that there is a widespread perception that when a practitioner reports another practitioner under the breach reporting rules, the reporting practitioner will be shielded under the whistleblower protection rules. In our view, this may be a misconception, based on the meaning of 'eligible whistleblower' in section 14ZZU of the TAA.

The definition of 'eligible whistleblower' in section 14ZZU of the TAA states that an individual can be considered eligible if they fall into any of the following categories in relation to an entity:

1. an officer of the entity as defined by the *Corporations Act 2001* (Cth);
2. an employee of the entity;
3. an individual who provides services or goods to the entity, whether paid or unpaid;
4. an employee of a person who supplies services or goods to the entity, whether paid or unpaid;
5. an individual who is an associate of the entity as defined by section 318 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**);
6. a spouse or child of an individual mentioned in any of the previous categories;
7. a dependent of an individual mentioned in any of the previous categories or their spouse; and
8. an individual prescribed by the regulations for this purpose in relation to the entity.

Schedule 2 to the *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2023* amends the whistleblower protection rules by expanding the protection to include disclosures to the TPB (as well as certain medical practitioners) in addition to existing protection where disclosures are made to the Commissioner.

As the amendments to the whistleblower protection rules have been enacted on 31 May 2024, we acknowledge the TPB will need time to provide guidance. However, it is important to note that the amendments do not change the definition of 'eligible whistleblower'.

Under paragraph 318(1)(b) of the ITAA 1936, a partner in a partnership is an associate of another partner in that same partnership. However, two unrelated practitioners will generally not be associates of each other.

Therefore, a reporting practitioner who is a partner at the same firm as the practitioner whose conduct is reported should be considered an eligible whistleblower as they are an 'associate' under section 318 of the ITAA 1936. In contrast, a practitioner who reports a reportable breach by another practitioner to the TPB or the Commissioner, but is unrelated to that other practitioner, and does not otherwise fall within any of the abovementioned categories, will not be an eligible whistleblower and therefore will not be entitled to receive any protection under that framework. This discrepancy means that a practitioner reporting a reportable breach by a partner at the same firm is entitled to receive protection not afforded to them when they report an unrelated practitioner. In our view, there is no basis for this inconsistency.

While the amendments are a policy issue that is not a matter for the TPB, and do not alter the definition of 'eligible whistleblower', we recommend that the TPB should update its guidance to provide more clarity to practitioners on this aspect.

We also suggest the TPB take steps to safeguard the privacy of reporting practitioners who do not wish to be identified to the practitioner who is the subject of the reportable breach. The online complaint form currently enables practitioners to submit complaints anonymously. However, while practitioners should not be able to report breaches anonymously to the TPB (else they could not prove that they had met their breach reporting obligations among other reasons), they should be able to indicate if they want to safeguard the confidentiality of their identity from a practitioner when reporting a reportable breach by that practitioner. This could be achieved through a checkbox option on the online form if that is what is proposed to be used for such reporting.