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Our ref: WD NFP

Individuals and Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [ExternalConductStandards@treasury.gov.au](mailto:ExternalConductStandards@treasury.gov.au)

Dear Treasury Team

**External conduct standards for charities registered with the Australian Charities and Not-for-profits Commission**

Thank you for the opportunity to provide comments on the draft regulations and explanatory statement for the proposed external conduct standards that charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**) will need to comply with when operating outside Australia. The Queensland Law Society (**QLS**) appreciates the consultation on this important issue.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission is made by the Not-for-Profit Committee of the Queensland Law Society ("**Committee**"). The Committee is comprised of senior lawyers with specific expertise in the area of the law of not-for-profits, charity and associated tax concessions in Queensland.

**Executive Summary**

QLS has had the benefit of reviewing the submission prepared by the Not-for-profit Committee of the Law Council of Australia, which we endorse.

However, in doing so, we wish to emphasise the following three key points in particular, that the introduction of new obligations should:

- represent a necessary regulatory response that is proportionate to the nature and degree of risk for which the obligations seek to regulate;
- reflect the significant insight generated from the public consultations on the ACNC Review, published in August 2018, namely with the Standard on compliance with Australian laws;

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- acknowledge the potentially significant increased administrative burden involving record-keeping and reporting obligations (and associated costs); and
- use language consistent with the Governance Standards making it clear that it is both charitable purpose **and** character as a not-for-profit entity that is relevant.

### 1. Appropriate regulatory response

The introduction of new compliance obligations should represent a necessary regulatory response to the nature and extent of risk for which the obligations seek to regulate.

QLS endorses both the Law Council of Australia's position and the ACNC Review recommendations that a risk-based regulatory model be adopted, which would help ensure the resources of the ACNC are applied where they are likely to have the most impact.

This position was endorsed by the Australian Criminal Intelligence Commission as well, which recommended the following:

*'A sector specific risk-based regulatory model would identify high risk charities based on specific risk indicators such as high-risk financial transactions operating in locations with proscribed terrorist organisations, and other criminal-related risks such as fraud and money laundering. These risk indicators would inform the charity's risk rating and determine the regulatory and compliance regime for the charity and its activities.'*

The Standards should ideally provide a foundation upon which registered entities may develop appropriate risk management and mitigation frameworks, which is sector and risk specific.

### 2. Compliance with Australian Laws

Given that the ACNC does not have the authority, resources or mandate to regulate whether registered entities are complying with Australian laws, QLS submits that section 50.20(4), which obliges a registered entity to comply with certain categories of Australian laws, be deleted on the basis that the registered entity would already be required to comply with any applicable laws.

We note that the ACNC Review Panel concluded that:

*Governance standard 3 is not appropriate as a governance standard. Registered entities must comply with all applicable laws. It is not the function of the ACNC to force registered entities to enquire whether they may or may not have committed an offence (unrelated to the ACNC's regulatory obligations), advise the Commissioner of that offence and for the ACNC to advise the relevant authority regarding the offence.*

Accordingly, paragraph 50.20(4) should be deleted or at the very least clarified, to assist registered entities with better understanding what specific laws they are requiring to comply with.

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### 3. Increased administrative burden

Although QLS recognises the need for organisations to be transparent and accountable to the Australian public in relation to its activities carried on outside of Australia, depending on the level of detail expected when reporting, compliance with this Standard has the potential to be significantly onerous.

#### Standard 3 – anti-fraud and anti-corruption

We endorse the Law Council of Australia's submission in respect of these issues, but wish to emphasise that in paragraph (3)(b), the following words should be deleted:

"perceived or"

Identifying and documenting material conflicts of interest for employees and others working outside the country in third world countries is likely to be problematic.

Otherwise, we note the commentary on page 8 of the Explanatory Materials that provides '*It is expected that the ACNC will release guidance on the records that should be obtained and kept prior to this standard commencing.*'

### 4. Purpose and character as a not-for-profit entity

Both draft External Conduct Standards 1 and 3 use the following language (**emphasis added**):

*ensures that the registered entity is operating in a way that is consistent with its **purpose and character as a not-for-profit entity***

The QLS notes that in contrast the Governance Standards (Governance Standard 1) uses the following language (**emphasis added**):

(2) *A registered entity must:*

(a) *be able to demonstrate, by reference to the governing rules of the entity or by other means, its purposes **and its** character as a not-for-profit entity; and*

...

(c) *comply with its purposes **and its** character as a not-for-profit entity.*

There is a two fold test in view, firstly compliance with charitable purposes, and secondly character as a not-for-profit entity. They are different tests. The language in the proposed External Conduct Standards, by omitting the word "its" loses the clarity of the two fold test and rather potentially just focuses the reader on the "not-for-profit" nature of the entity rather than also its charitable purpose.

Therefore the QLS submits that the word "its" should be inserted before the words "character as a not-for-profit entity" in draft External Conduct Standards 1 and 3.

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**Conclusion**

QLS supports the introduction of the External Conduct Standards on an in principle basis.

However, the final External Conduct Standards should be designed to strengthen a registered entity's impact overseas within a well-defined risk management and mitigation system, and not to diminish a registered entity's ability to realise its purpose due to onerous and disproportionate regulatory obligations.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Principal Policy Solicitor, Wendy Devine by phone on (07) 3842 5896 or by email to [w.devine@qls.com.au](mailto:w.devine@qls.com.au).

Yours faithfully

  
Ken Taylor  
**President**