

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Education

### *Higher Education Support Act 2003*

#### **Higher Education Support (Fit and Proper Person) Instrument 2019**

#### **Purpose**

The purpose of the *Higher Education Support (Fit and Proper Person) Instrument 2019* (the Instrument) is to:

- i. repeal and replace the *Fit and Proper Person Specified Matters 2012* [F2012L00598] instrument; *and*
- ii. specify matters the Minister must take into account when determining whether a body corporate, or a person who exercises a degree of control or influence over the operation of a body corporate seeking approval as a Higher Education Provider (HEP) or a Vocational Education and Training (VET) provider, is fit and proper.

This Instrument is made to ensure that persons who exercise a degree of control or influence over the management of a HEP or a VET provider are people in whom the Minister is likely to have confidence in their suitability to manage a body corporate that receives Commonwealth monies.

#### **Summary**

This Instrument provides for the matters the Minister must take into account when assessing whether to approve a body corporate as a HEP or a VET provider (and whether to revoke the approval of a HEP or VET provider), including, but not limited to; compliance with the law; financial history; management history; the provision of false or misleading information; previous professional conduct in the higher education, vocational education and international education sectors; and any prior relationship with a State or a Territory for the provision of education.

#### **Authority**

This Instrument is made under subsection 16-25(4), and subclause 6(4) of Schedule 1A, of the *Higher Education Support Act 2003* (the Act).

The repeal of the *Fit and Proper Person Specified Matters 2012* instrument is enabled by subsection 33(3) of the *Acts Interpretation Act 1901* (Cth).

## **Background**

The Act provides for approval of bodies corporate as higher education providers and VET providers. This Instrument is made under subsection 16-25(4) and subclause 6(4) of Schedule 1A to the Act.

Section 16-25 of the Act allows the Minister to approve a body corporate as a higher education provider subject to the body meeting a number of requirements listed in that section. This includes, at paragraph 16-25(1)(g), a requirement that the Minister is satisfied that: the body; and each person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the body's affairs is a fit and proper person.

Subsection 16-25(3) provides that the Minister must, in deciding whether he or she is satisfied that a person is a fit and proper person, take into account the matters specified in an instrument under subsection (4) and any other matters the Minister considers relevant.

Subsection 16-25(4) requires the Minister to make a legislative instrument setting out the matters that the Minister must take into account for the purposes of deciding whether a person is a fit and proper person.

Clause 6 of Schedule 1A to the Act allows the Minister to approve a body corporate as a VET provider subject to the body meeting a number of requirements listed in that clause. This includes a requirement that the Minister is satisfied that: the body and each person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the body's affairs is a fit and proper person (paragraph 6(1)(h)).

Subclause 6(3) provides that the Minister must, in deciding whether he or she is satisfied that a person is a fit and proper person, take into account the matters specified in an instrument under subclause (4) and any other matters the Minister considers relevant.

Subclause 6(4) requires the Minister to make a legislative instrument for the purposes of deciding whether a person is a fit and proper person.

While subclause 6(5) of Schedule 1A provides that the Minister cannot approve a VET provider after 4 October 2016, the Instrument is relevant to decisions to revoke approvals of existing VET providers under clause 33A (Revocation of approval as a provider if provider etc. not a fit and proper person).

## **Consultation**

Consultation on the Instrument has not been undertaken as the Instrument imposes no new obligations on applicants for approval as a higher education or a VET provider. The requirements will provide transparency for applicants by providing a clear understanding of the matters that the Minister will consider as a part of the approval process.

## **Regulatory Impact Statement**

The Office of Best Practice Regulation (OBPR) has been consulted. A Regulation Impact Statement is not required for these Guidelines (OBPR ID 23140).

## **Definitions**

***officer*** has the meaning given by subsection 179-15(1) of the Act.

***personal information*** has the meaning given by section 179-5 of the Act.

## EXPLANATION OF PROVISIONS

### Part 1 – Preliminary

**Section 1** of the Instrument states that this instrument is the *Higher Education Support (Fit and Proper Person) Instrument 2019*.

**Section 2** specifies that the Instrument commences the day after the Instrument is registered.

**Section 3** provides that this Instrument is made under subsection 16-25(4) and subclause 6(4) of Schedule 1A to the Act.

**Section 4** defines various terms used in this Instrument.

**Section 5** provides that each instrument that is specified in Schedule 1 to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Instrument has effect according to its terms. Schedule 1 sets out the repeal of the *Fit and Proper Person Specified Matters 2012*.

### Part 2 – Fit and proper person

**Section 6** provides that this Instrument is made for the purposes of subsection 16-25(4) and subclause 6(4) of Schedule 1A to the Act. Section 6 also provides that the Minister, when determining that a person is fit and proper, must take into account the matters specified in this Part.

**Section 7** specifies that the Minister must have regard to the person's compliance with the law, in particular whether; the person has been convicted of an offence against, or any pecuniary penalty has been ordered to be paid under a law of the Commonwealth or a State or Territory; there are any proceedings before a court or tribunal; and if any convictions have been recorded, the seriousness of the offence or contravention concerned.

**Section 8** specifies that the Minister must have regard to the financial record of the person, including but not limited to; insolvency; bankruptcy; external administration and outstanding debts to the Commonwealth.

**Section 9** specifies events in a person's management history that the Minister must have regard to. This includes management of a registered HEP or registered training organisation and any condition, cancellation or revocation, placed upon that organisation during the registration period.

**Section 10** specifies that the Minister must have regard to the intentional provision of false or misleading information by the person, to the Minister or to other regulatory bodies.

**Section 11** specifies that the Minister must have regard to whether the person has previously been found not to be a fit and proper person. Section 11 provides that the Minister must have regard to the conduct of a person that may reasonably suggest a deliberate pattern of unethical behaviour in relation to the provision of education or training, as an individual and as a person of influence in respect of a business. It also provides that the Minister must have regard to any other matter relevant to the honesty, knowledge or ability of the person.

### **Schedule 1 – Repeals**

**Item 1** of Schedule 1 repeals the whole of the instrument *Fit and Proper Person Specified Matters 2012*.

# STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

## **Higher Education Support (Fit and Proper Person) Instrument 2019**

This Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Instrument**

The *Higher Education Support (Fit and Proper Person) Instrument 2019* (the Instrument) is made by the Minister under subsection 16-25(4) of the *Higher Education Support Act 2003* (the Act), and subclause 6(4) of Schedule 1A to the Act.

### **Background**

For the Minister to approve a body corporate as a higher education provider or a vocational education and training (VET) provider the Minister must, among other things, be satisfied that the body and those persons who participate in making decisions that affect the whole or substantial part of the body's affairs are fit and proper.

Similarly, the Minister must continue to be satisfied that the body and those persons who participate in making decisions that affect the whole or substantial part of the body's affairs are fit and proper in order for the body to retain its approval as a higher education provider or a VET provider.

### **Purpose**

The purpose of the Instrument is to specify matters which the Minister must take into account when assessing whether a body corporate (or a body); including each person who makes or participates in making decisions that affect the whole or a substantial part of the body's affairs, is a fit and proper person.

### **Human rights implications**

#### *Right to education*

The Instrument engages the right to education contained in Article 13 of the *International Covenant on Economic, Social and Cultural Rights*. In particular, this Instrument has an effect on the regulation of higher education providers and VET providers by defining what the Minister must consider when deciding whether a body corporate and certain persons involved in the body's affairs are fit and proper. This would subsequently inform the Minister's decision about whether or not to approve the body corporate to become a higher education provider or a VET provider.

Consideration of these matters will help enhance the integrity of the higher education and VET schemes.

To the extent that the right to education is engaged, this right is promoted by this Instrument, which aims to strengthen the integrity of the higher education and VET sectors for the benefit of students.

### *Right to privacy*

The Instrument also engages the right to privacy contained in Article 17 of the *International Covenant on Economic, Social and Cultural Rights* as the Instrument requires the collection of personal information to assess whether a person involved in the decision-making of a body corporate (or a body) is fit and proper.

*Personal information* is protected under the Act. The Act is consistent with the *Privacy Act 1988* (Privacy Act) and includes the requirement that higher education and VET providers comply with the Australian Privacy Principles in the Privacy Act. The Act also imposes penalties where an *officer* uses, or discloses personal information other than during the course of their official employment.

To the extent that the right to privacy is engaged, it is promoted by this Instrument as any personal information collected by the Department of Education and Training in this context is protected in a manner that is consistent with the Privacy Act.

### **Conclusion**

This Instrument is compatible with human rights because it advances the protection of human rights.