

EXPLANATORY STATEMENT

Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 – Amendment No. 1 of 2025

Issued by the authority of the Tertiary Education Quality and Standards Agency

Subject: *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 – Amendment No. 1 of 2025*

Authority

Subsection 7A(2) of the *Tertiary Education Quality and Standards Agency Act 2011* (the Act) allows TEQSA to determine, by legislative instrument, the matters that TEQSA may have regard to when determining whether a person is a fit and proper person for the purposes of the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The required approval from the Minister for TEQSA to make an amendment instrument under subsection 7A(2) was provided, per the requirement in subsection 7A(3) of the Act, on 20 March 2025.

Purpose and operation

The *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018* (FPP Determination) specifies the matters that TEQSA may have regard to when determining whether a person is fit and proper under paragraph 21(1)(b), section 25A and paragraph 36(1)(b) of the Act.

- Under subsection 21(1), TEQSA may only grant an application for registration as a higher education provider if TEQSA is satisfied of several matters including that the applicant, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the applicant's affairs is a fit and proper person.
- Under section 25A of the Act, it is a condition of each higher education provider's registration that the provider, and each person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs, must be a fit and proper person.
- Under subsection 36(1) of the Act, TEQSA may only renew a higher education provider's registration if TEQSA is satisfied of several matters including that each

person who makes or participates in making decisions that affect the whole, or a substantial part, of the provider's affairs is a fit and proper person.

The *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 – Amendment No. 1 of 2025* (the Instrument) amends the FPP Determination to expand the matters that TEQSA may have regard to when determining if a person is fit and proper for the purposes of the Act. The amendments would give TEQSA the capacity have regard to the following matters:

- whether the person has been convicted of a foreign offence (within the meaning of section 85ZL of the *Crimes Act 1914*);
- whether the person has been found not to be a fit and proper person for the purposes of any law of the Commonwealth or of a State or Territory; and
- whether the public is unlikely to have confidence in the person's suitability to be a person who makes or participates in making decisions that affect the whole, or a substantial part, of a registered higher education provider's affairs.

The amendments create greater alignment between the FPP Determination, the *Standards for Registered Training Organisations (RTOs) 2015* (RTO Standards) and the *Higher Education Support (Fit and Proper Person) Instrument 2019* (HES Instrument) as three instruments in the Education portfolio that go to the consideration of fitness and propriety of education providers and associated persons.

- Schedule 3 of the RTO Standards sets out the matters the National VET Regulator (the Australian Skills Quality Authority or ASQA) may have regard to when determining whether persons are fit and proper, in the context of making decisions regarding applications for registration, applications for renewing registration and maintenance of registration under the *National Vocational Education and Training Regulator Act 2011* (NVETR Act).
- the HES Instrument sets out the fit and proper person requirements the Minister for Education must take account when determining whether particular persons are fit and proper in the context of making a decision about whether to approve a body corporate as a higher education provider or approve a body as a VET provider under the *Higher Education Support Act 2003* (HES Act).

The objects of the Act, set out in section 3, include protecting and enhancing Australia's reputation for quality higher education and, protecting students undertaking higher education. The amendments to the FPP Determination support these objectives by:

- imposing more appropriately stringent expectations on persons participating in making important decisions at higher education providers, thereby strengthening the governance capability and the integrity of the higher education providers.
- providing the public with greater reason to have confidence in the persons charged with operating higher education providers; and
- mitigating the risk of poor corporate leadership and governance leading to inadequate higher education or, the potential collapse of higher education providers.

Consultation

TEQSA consulted with ASQA and the Department of Education in late 2023 in relation to the proposed amendments to the FPP Determination. TEQSA ran a public consultation on the proposed amendments from 17 April – 20 May 2024, receiving six submissions from higher education providers and one from a peak body.

The submissions were generally supportive of the proposed amendments, but concerns were raised about the addition of the public confidence consideration. The concerns can be summarised broadly as:

- concerns about inappropriate subjective assessments or processes (possibly affected by bias or ‘unsound perceptions’) informing whether TEQSA is satisfied of a person’s fitness and propriety; and
- concerns about how TEQSA will acquire the information about the public’s confidence in a person and afford that person with procedural fairness.

As noted above, the amendments in the Instrument are intended to create greater alignment between the FPP Determination, the RTO Standards and the HES Instrument. In particular, the public confidence consideration that will be added to the FPP Determination is already included in the RTO Standards, and so is not novel.

Importantly, where TEQSA has concerns about a person’s fitness and propriety, TEQSA will always afford procedural fairness and an opportunity to respond to any relevant information, including information that may indicate that the public confidence consideration is relevant. Further, TEQSA’s public guidance materials relating to fitness and propriety will be updated to provide appropriate information regarding how TEQSA will apply the public confidence consideration.

Commencement

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and will commence on the day after it is registered.

Description of the provisions

Section 1 of the instrument provides that the name of the Instrument is the *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 – Amendment No. 1 of 2025*.

Section 2 provides that the amendments to the FPP Determination will commence on the day after the Instrument is registered.

Section 3 provides that the Instrument has been made under subsection 7A(2) of the Act.

Section 4 provides that the Instrument amends the current fee instrument as set out in Schedule 1.

Schedule 1

Items 1 inserts new subsection 6(1A) providing that, when determining if a person is fit and proper, TEQSA may have regard to whether a person has been convicted of a foreign offence. New subsection (1A) provides that 'foreign offence' has the meaning prescribed in section 85ZL of the *Crimes Act 1914*.

Item 2 inserts new paragraph 10(1)(i) providing that, when determining if a person is fit and proper, TEQSA may have regard to whether that person has previously been found not to be a fit and proper person for the purposes of any law of the Commonwealth, a State or Territory. This expands upon the list of laws TEQSA is already permitted to consider under subsection 10(1).

Item 3 inserts new subsection 10(3A) providing that, when determining if a person is fit and proper, TEQSA may have regard to whether the public is unlikely to have confidence in the person's suitability to be a person who makes or participates in making decisions that affect the whole, or a substantial part, of a registered higher education provider's affairs.

Statement of Compatibility with Human Rights

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

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The Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018 – Amendment No. 1 of 2025 (Amending 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 Legislative Instrument

The purpose of the Amending Instrument is to amend the *Tertiary Education Quality and Standards Agency Fit and Proper Person Determination 2018* (FPP Determination), which sets out the matters TEQSA may have regard to for the purposes of determining whether a person is fit and proper.

The amendments to the FPP Determination create greater alignment between the FPP Determination, the *Standards for Registered Training Organisations (RTOs) 2015* and the *Higher Education Support (Fit and Proper Person) Instrument 2019* as three instruments in the Education portfolio that go to the consideration of fitness and propriety of education providers and associated persons.

The amendments allow TEQSA to take into consideration any history of convictions under foreign laws, any history of being found not fit and proper under an Australian law and public confidence in an individual's suitability. The amendments to the FPP Determination support the objectives of the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) by:

- imposing more appropriately stringent expectations on persons participating in making important decisions at higher education providers, thereby strengthening the governance capability and the integrity of the higher education providers.
- providing the public with greater reason to have confidence in the persons charged with operating higher education providers; and
- mitigating the risk of poor corporate leadership and governance leading to inadequate higher education or, the potential collapse of higher education providers.

Human rights implications

Right to education

The Amending Instrument engages the right to education which is set out in Article 13 of the *International Covenant on Economic, Social and Cultural Rights*. The right to education recognises the important personal, societal, economic and intellectual benefits of education, and provides that secondary education in its different forms, including higher education, shall be made generally available and accessible to all by every appropriate means.

The requirement under the TEQSA Act for higher education providers, and certain persons involved with higher education providers, to be fit and proper, goes toward ensuring that providers are well governed and act with integrity in the delivery of education services.

The Amending Instrument has an effect on the regulation of higher education by specifying additional matters that TEQSA may take into account in determining whether a person is a fit

and proper person. These matters include a person's history of convictions under foreign laws, history of being found not fit and proper under an Australian law, and consideration of public confidence in a person's suitability to hold decision-making positions in a higher education provider. By incorporating these additional matters, the Amending Instrument places more stringent integrity requirements on higher education providers and persons who participate in making important decisions about the governance of higher education providers.

This supports TEQSA's capacity to ensure integrity in the higher education sector, which will enhance the quality and sustainability of Australian higher education and, in turn, promote the right to education.

The amending instrument is compatible with the right to education.

Conclusion

This amending instrument is compatible with human rights because it promotes the protection of human rights.

Adrienne Nieuwenhuis
Acting Chief Commissioner

Stephen Somogyi
Commissioner

Tertiary Education Quality and Standards Agency