

EXPLANATORY STATEMENT

Matters specified under subsection 16-25(4) of, and subclause 6(4) of Schedule 1A to, the *Higher Education Support Act 2003*.

Fit and Proper Person Specified Matters 2012

Issued by the authority of the Minister for Education, Skills, Science and Research

Authority

This Instrument is made under section 16-25(4) of, and subclause 6(4) of Schedule 1A to, the Act.

The *Higher Education Support Act 2003* (the Act) provides for approval of bodies corporate as higher education providers and VET providers.

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 participated 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 or 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 for the purposes of subsection (3), that is, for the purposes of deciding whether a person is a fit or 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, at paragraph 6(1)(h) a requirement that the Minister is satisfied that: the body; and each person who makes, or participated in making, decisions that affect the whole, or a substantial part, of the body's affairs; is a fit and proper person.

Subclause 6(3) of Schedule 1A to the Act provides that the Minister must, in deciding whether he or she is satisfied that a person is a fit or 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 subclause (3), that is, for the purposes of deciding whether a person is a fit or proper person.

Purpose

The purpose of the *Fit and Proper Person Specified Matters* (the Specified Matters) are to 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 or a VET provider, is a fit and proper person.

The objectives of the Specified Matters are to ensure that persons who exercise a degree of control or influence over the management of the body corporate are people in whom the Minister is likely to have confidence in their suitability to manage, or be involved with, a body corporate that receives Commonwealth monies in the form of FEE-HELP or VET FEE-HELP.

These Specified Matters are similar to the fit and proper person requirements made under the *National Vocational Education and Training Regulator Act 2011* and identify the persons required to meet the fit and proper person requirements.

Consultation

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

Statement of Compatibility with Human Rights

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

This Legislative Instrument (the 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 Fit and Proper Person Specified Matters 2012 Instrument (the Instrument) is made by the Minister under subsection 16-25(4) of, and subclause 6(4) of Schedule 1A to, the *Higher Education Support Act 2003* (the Act).

The purpose of the Instrument is to specify matters which the Minister must take into account when making a decision the Minister is satisfied that a body corporate; and each person who makes, or participates in making, decisions that affect the whole or a substantial part of the body corporate's affairs, is a fit and proper person for the purposes of subsection 16-25(3) of the Act and subclause 6(3) of Schedule 1A to the Act.

For the Minister to approve a body corporate as a higher education provider or a 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 corporate'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 corporate's affairs are fit and proper in order for the provider to retain their approval as a higher education provider or a VET provider.

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 and VET institutions by defining what the Minister must consider in making a decision as to whether the Minister is satisfied the body corporate and certain persons involved in the body are fit and proper. This then leads to a decision about the body corporate's suitability to be a higher education provider or VET provider.

The objective of the requirements is to ensure that consideration is given to whether persons who exercise a degree of control or influence over the management of a body corporate who is, or applies to be, a higher education provider or VET provider are suitable to operate a higher education provider or VET provider. The kinds of matters listed in the instrument include the past history of the body corporate and those persons who exercise a degree of control or influence over the management of a body corporate particularly related to the higher education and VET sectors and the financial viability of the body corporate and persons who exercise a degree of control or influence over the management of a body corporate. Consideration of these matters by the Minister in making a decision as to whether a body corporate is fit and proper will help ensure integrity in the higher education and VET system.

To the extent that the right to education is engaged, this right is promoted by the Instrument as the Instrument aims to improve the integrity of the higher education and VET sectors.

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 is fit and proper.

Personal information is protected under the Act. The Act is consistent with the *Privacy Act 1988* and includes the requirement that higher education and VET providers comply with the information privacy principles in *the Privacy Act 1988*. The Act also includes the use of penalties where an officer uses personal information acquired in the course of their official employment for purposes other than their official employment.

To the extent that the right to privacy is engaged, it is promoted by the Instrument as any personal information which is collected is protected in a way that is consistent with the *Privacy Act 1988*.

Conclusion

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

Description of the provisions of the Requirements

6 Fit and Proper Persons Specified Matters

- 6.1 Sets out the matters that the Minister must have regard to when making a decision about whether a body corporate or a person meets the fit and proper person requirements for approval as a higher education provider or a VET provider. The matters that the Minister must have regard to in considering whether a body corporate is a fit and proper person under the Act focus on business and financial affairs of the body and compliance with regulatory schemes within the training and education.

Body Corporate

The matters that the Minister must have regard to in considering whether a body corporate is a fit and proper person under the Act focus on business and financial affairs of the body and compliance with relevant regulatory schemes.

Person

The matters that the Minister must have regard to in considering whether a person is a fit and proper person under the Act focus on the person's honesty, record of financial management and compliance with relevant regulatory schemes.

- 6.2 Identifies the people that the minister must consider when making a decision. The provisions apply to an '*officer*' as defined under section 9 of the *Corporations Act 2001* as an '*officer of a corporation*'. The provision makes it clear the range of persons that make, or participate in making, decisions that affect the whole or substantial part of the body corporate's affairs.